Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);BRADLEY M. CAMPBELL, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Third Circuit Court of Appeals erred and violated the Petitioners' rights to due process of law when it summarily affirmed the district court's orders on appeal after vacatur and remand, thus precluding all briefing and argument on the merits by Petitioners, when the standard for summary disposition was not met on a record exhibiting that the district court's original orders were vacated and annulled for error by the Court of Appeals?

II. Whether the Third Circuit Court of Appeals erred and violated the Petitioners' rights to due process of law when it summarily affirmed the district court's orders on appeal after vacatur and remand and precluded any opportunity for normal briefing and argument on the merits by Petitioners, when the standard for summary disposition was not met on a record exhibiting the district court's deliberate refusal to comply with remand orders?

III. Whether the Court of Appeals erred and infringed upon the Petitioners rights to due process of law when it granted a non-party's motion for summary affirmance of lower court orders on appeal after vacatur and remand, though it lacked jurisdiction to entertain such a motion from a non-party to the appeal?

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IN THE
SUPREME COURT of the UNTIED STATES

Robert W. Grine II, JoAnne D. Grine, and the
Estate of Margaret M. Grine,
Petitioners

vs.

The Estate of William R. Coombs, et al,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

Petitioners, Robert W. Grine II, JoAnne D. Grine, and the Estate of Margaret M. Grine, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 17, 2000.

OPINIONS BELOW

The United States Court of Appeals' opinion and order of July 15, 1999, which is unreported, appears at Appendix A (App. A.). The District Court orders of April 18, 2000, appear at Appendix B (App. B.). No opinion was written or reported. The decisions of the United States Court of Appeals of September 13, 2000, granting without opinion the Commonwealth of Pennsylvania Department of Environmental Protection and Daniel Holler and Gary Wozniak's (Commonwealth Appellees) Motion for Summary Affirmance of the district court orders of April 18, 2000 and Withdrawal of Appellees' Motion to Dismiss, and granting the United States' Motion for Summary Affirmance, appear at Appendix C, and they are unreported (App. C.). The summary decision of the U.S. Court of Appeals denying the timely filed Petition for Rehearing appears at Appendix D (App. D.) and it is unreported.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The orders of the United States Court of Appeals summarily affirming the district court's orders of April 18, 2000, were issued on September 13, 2000. The Court of Appeals denied Petitioners' timely Petition for Rehearing on November 17, 2000. A certified copy of the judgement was issued in lieu of a formal mandate on December 20, 2000.

The question presented did not arise until Petitioners received the Third Circuit Court of Appeals' summary decisions affirming the District Court orders of April 18, 2000. Petitioners thereupon sought rehearing and argued that the Court of Appeals had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case concerns the Fifth Amendment to the United States Constitution which provides in pertinent part, that "No person shall ... be deprived of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants are William R. Coombs; Billie M. Yost; Jack Shrum, et. ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA.

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S. C. §9601 et. seq., as amended

by the Superfund Amendments and Reauthorization Act of 1986. Petitioners also brought suit against the US EPA and its Region III Director under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also asserts causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

In September of 1998, Petitioners filed their Notice of Appeal at No. 98-3494 of two interlocutory orders issued by the District Court. Petitioners appealed from the Orders of December 31, 1996 as amended by the orders of August 17, 1998; the Petitioners also appealed from that portion of the August 17th order denying Plaintiffs' Motion for Reconsideration of the Order of February 9, 1998, and the order entered on August 25, 1998, limiting the evidentiary scope of a contempt hearing. The order of August 17th was entered as a final judgement in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

On July 15, 1999, at No. 98-3494, the Third Circuit Court of Appeals vacated and annulled for error the District Court's orders granting the Commonwealth's motion to dismiss for lack of subject-matter jurisdiction federal claims against all of the Commonwealth Defendants in an individual and official capacity, with prejudice, and dismissing state law

claims against the Commonwealth Defendants without prejudice, for lack of subject-matter jurisdiction.

The Court of Appeals affirmed the lower court's order of August 17, 1998, denying Plaintiffs' Motion for Reconsideration of the order of February 9, 1998. A timely Petition for Rehearing was filed on August 26, 1999, and denied by the Appellate Court, on October 1, 1999. Plaintiffs' Petition for Certiorari pertaining to this order was denied by the U.S. Supreme Court on February 22, 2000. The district court entered its new orders after vacatur and remand on April 18, 2000. Petitioners filed their Notice of Appeal on April 28, 2000. The appeal was docketed on May 11, 2000. The briefing and scheduling order was entered on August 23, 2000, setting the deadline for filing of an appeal brief by October 2, 2000. The appeal at 00-1460 had been assigned on June 15, 2000 by the Third Circuit to the appellate mediation program as per Local Appellate Rule 33.0. Petitioners, the PA DEP and the United States were ordered to attend the Mediation Session of August 10, 2000. No settlement was effected.

On March 21, 2000, Petitioners filed a motion to recall or vacate the mandate, on grounds that the opinion of July 15, 1999 at No. 98-3494 was in conflict with the subsequent decision of the United States Supreme Court regarding the requisite showing for standing and the forms of redress available to citizen-plaintiffs, in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 120 S. Ct. (2000), as decided on January 12, 2000. The Court of Appeals denied the motion for recall on March 29, 2000. Timely petition for rehearing was filed on April 7, 2000 and denied on April 20, 2000.

On July 17, 2000, the PA DEP's Rule 27 Motion for Dismissal was submitted to the Court of Appeals. Petitioners filed an immediate response to this motion; on August 1, 2000, the Court of Appeals referred the PA DEP's Motion to the ultimate merits panel without prejudice to filing of a motion for summary affirmance.

The United States submitted its motion for summary affirmance on July 19, 2000. Petitioners in their response argued that a fraud had been worked on the Court of Appeals through government falsification of the record as to the harm being inflicted on the plaintiffs, and through the deliberate refusal of local, state and federal authorities and parties to this action to protect the Grines from criminal assaults in the form of poisoning and other physical attacks on their persons and property (i.e., drive-by shooting, stalking, and terroristic threats). Subsequent to the filing of this pleading, the physical attacks made on the Petitioners by persons in the employ of illegal transporters of hazardous waste on the Coombs site and by other as-yet-unknown assailants escalated in intensity to the point that counsel feared for her clients' lives. A narrative report of fifteen (15) of the worst of these criminal episodes from November of 1999 to the present was submitted on February 5, 2001, to the Special Agent in Charge of the Pittsburgh Office of the FBI, the U.S. Attorneys Office in Pittsburgh, and the Office of the Federal Ombudsman of the U.S. EPA, Robert Martin. Petitioners' response to this motion was filed on July 25, 2000, and it also emphasized the fact that the United States was a non-party to the orders on appeal after remand. The PA DEP again filed a motion for summary affirmance on August 21, 2000. Petitioners filed their response on August 30, 2000, emphasizing the irrelevance of law of the case doctrine to a vacated order.

On September 13, 2000, the court of Appeals without opinion granted the Commonwealth of Pennsylvania Department of Environmental Protection, Daniel Holler and Gary Wozniak's Motion for Summary Affirmance of the lower court orders of April 18, 2000 and granted the PA DEP's withdrawal of their motion to dismiss the appeal. On September 13, 2000, the Court of Appeals also granted the United States' Motion for Summary Affirmance of the Orders of April 18, 2000. These motions were affirmed over five months after Petitioners had filed their notice of appeal, and barely two weeks before the deadline came due for filing their appellate brief as per the court's scheduling orders.

On October 26, 2000, Petitioners filed their timely Petition for Rehearing which was summarily denied by the Court of Appeals on November 17, 2000.

On November 28, 2000, Petitioners filed in the appellate court a motion to stay the mandate. This motion was denied without prejudice to their right to file a timely petition for certiorari. Petitioners then filed a motion for stay of the mandate with the U.S. Supreme Court on January 5, 2001; this motion was denied on January 10, 2001, by Justice Souter.

REASONS FOR GRANTING THE WRIT

I. **The decision of the Third Circuit Court of Appeals conflicts with this Court's precedents and with settled law in the Third Circuit and other appellate jurisdictions.**

A. The Circuit Court of Appeals has operated in defiance of its own in-house rules of procedure and in so doing has infringed upon the Petitioners' fundamental right to obtain meaningful appellate review.

The Court of Appeals on July 15, 1999, vacated for error the district court orders of December 31, 1996, as amended by the order of August 17, 1998. On December 31, 1996, the district court dismissed with prejudice all federal and state claims against the Commonwealth Department of Environmental Protection and its agents Gary Wozniak and Daniel Holler, in an individual and official capacity, for lack of subject-matter jurisdiction. On August 17, 1998, the order of December 31, 1996, was amended to reflect that the Plaintiffs' state law claims against all of the Commonwealth Defendants were dismissed without prejudice, for lack of subject-matter jurisdiction.

The Court of Appeals on July 15, 1999, vacated and annulled for error the order of December 31, 1996, as amended and remanded for disposition in accordance with its opinion.

The district court apparently thought it could dismiss all state and federal claims against the Commonwealth defendants in an individual and official capacity for lack of subject-matter jurisdiction.

The Court of Appeals knew this approach to be flawed and suggested instead that the lower court on remand dismiss the federal claims against the individual Commonwealth defendants on the merits in reliance on Fed. R. Civ. Proc.

12(b)(6); (this approach was also deeply flawed, because the Commonwealth never raised such a challenge to the Amended Complaint).

Because the PA DEP's motion for dismissal had never identified a 12(b)(6) challenge to the face of the Amended Complaint pursuant to the Federal Rules of Procedure, the district court logically never made reference to a 12(b)(6) challenge to the Amended Complaint in dismissing for lack of subject-matter jurisdiction in its order of December 31, 1996, as amended. It was an impossibility for the district court to make any such disposition on the merits when the court held on so many words that it lacked subject-matter jurisdiction of every federal claim made against the Commonwealth defendants.

The order of April 18, 2000, written as per instruction for the Court of Appeals, went in a brand-new direction and announced that the district court definitely entertained subject-matter jurisdiction of the federal claims against the Commonwealth Defendants in their individual capacities because in its new order the district court dismissed federal claims on their merits in purported reliance on Fed. R. Civ. Proc. 12(b)(6).

The district court in its prior opinion of August 17th had stated that plaintiffs had no standing to bring suit because they allegedly failed to demonstrate the invasion of a legally protected interest; standing implicates subject-matter jurisdiction, and theories regarding standing or its lack have nothing to do with dismissal on the merits. The Court stated specifically that it dismissed the action for lack of subject-matter jurisdiction based on a facial challenge to the complaint.

The order of August 17, 1998 only revised the order of December 31, 1996 to the following extent: Plaintiffs' state law claims against the Commonwealth Defendants were

dismissed without prejudice. In all other aspects, Plaintiffs' Motion for Reconsideration was denied.

Thus the order of December 31, 1996, was never altered to reflect that the district court entertained subject-matter jurisdiction of the federal claims against the Commonwealth Defendants in their individual capacities until the order of April 18, 2000, was entered on remand.

The Court of Appeals instructed the district court to vacate its standing order and to reflect in the next set of orders on remand that the district court most definitely entertained subject-matter jurisdiction of the federal claims against the Commonwealth Defendants in their individual capacities, because it must in fact dismiss these claims on the merits pursuant to Fed. R. Civ. Proc. 12(b)(6), on grounds that the federal statutes did not provide citizen-plaintiffs with a private right of action against individual polluters.

Petitioners believe this disposition of the case to be deeply wrong in view of the position adopted by the U.S. Supreme Court in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 120 S. Ct. 693 (2000), regarding available forms of redress for citizen-plaintiffs. It also remained the Plaintiffs' position that the record clearly indicated that a 12(b)(6) challenge was never raised by the Commonwealth in its pleadings in compliance with the Federal Rules of Procedure and could not be raised sua sponte by the district court or by the Court of Appeals.

The Commonwealth Appellees in their Rule 27 Motion for Summary Affirmance of August 21, 2000, erroneously stated that their original Motion to Dismiss filed pursuant to Fed. R. Civ. Proc. 8(e), was a motion for summary judgement. No such motion was ever filed by the PA DEP. The PA DEP asserted that the doctrine of law of the case dictated summary affirmance of the orders of April 18, 2000 on appeal after vacatur and remand.

Actual findings which are in error and which have been vacated do not constitute the law of the case. When a judgement is vacated, it is effectually extinguished and is without any validity, force or effect. The Court of Appeals overthrew, vacated, aborted, made void, repealed, revoked and revised the district court judgement erroneously concluding that the district court lacked subject-matter jurisdiction of all federal claims made against the individual Commonwealth Defendants. The Court of Appeals could not escape its obligation to correct this legal error. The judgement was annulled for error in this aspect, and in others: i.e., the district court erred in attempting to dismiss the Amended Complaint for lack of subject-matter jurisdiction with prejudice. The Court of Appeals in its opinion discussed at length the nature of this mistake. (Op. of the Ct.; App. A at pp. 5, 6.) Because the appellate court acted to vacate the decision below, that decision of the Court of Appeals does not operate as law of the case to constrain the Court of Appeals in further proceedings. Johnson v. Bd. of Education, 107 S. Ct. 2223, 72L.Ed.2d 668 (1982).

An erroneous decision is not the law of the case on subsequent appellate review. Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Surety Co., 177 F.3d 210 (3rd Cir. NJ 1999).

Other circuit courts of appeal have held that when the instruction of the Court of Appeals in remanding the case is to make such disposition of the case as might be appropriate, such decision does not preclude the Court of Appeals from entertaining an appeal on the merits from orders entered by the lower court on remand. Barber v. Yanish, 196 F.2d 53 (9th Cir. 1952).

Summary disposition is appropriate only when the position of one party is so clearly correct as a matter of law that no substantial question exists regarding the outcome of an appeal. Joshua v. U.S., 17 F.3d 378 (C.A. Fed. 1994).

The lower court has made a decree after vacatur and remand which prejudices the substantial right of plaintiffs, in respect of matter never concluded by the original decree, and its actions are subject to review upon a second appeal. Mackall v. Richards, 5 S. Ct. 170 (1884).

Local rules and Internal Operating Procedures of the United States Court of Appeals for the Third Circuit state unambiguously that the court may take summary action only if it clearly appears that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action. L.A.R. 27.4; IOP 10.6.

Other circuit courts of appeal, such as the United States Court of Appeals for the Fourth Circuit, have noted in their commentary on motions practice that motions for summary affirmance are reserved for extraordinary cases only and should not be filed routinely, but only on a record indicating that the issues raised on appeal are manifestly unsubstantial. Furthermore, in the majority view, motions for summary disposition should be made only after briefs are filed. If motions are submitted before the completion of the briefing schedule, the appellate court in fairness to the appellant should defer all action on the motion until the case is ripe for full disposition. The appellate court's failure to abide by its own rules has thus deprived the Petitioners of their right of meaningful access to the courts. It is of some importance to the public that full and fair review of legal questions be afforded to them, and not permanently removed through self interested manipulation by an appellate court of in-house rules. For this reason, Petitioners have sought review, and believe that in so doing they serve the public interest in fundamental fairness.

B. The Court of Appeals' summary affirmance of an order in which a lower court declined to exercise its supplemental jurisdiction over pendent claims without explanation should be reviewed because both the Court of Appeals and the lower court have ignored U.S. Supreme Court precedent and statutory authority to the effect that the district court must properly invoke statutory categories for declining to assert supplemental jurisdiction or else must assert its jurisdiction over pendent claims.

The Court of Appeals had no right to summarily affirm the district court's orders in this circumstance in view of the district court's deliberate refusal to clarify the record through explanation of its intentions to decline supplemental jurisdiction. The district court had written in its order of December 31, 1996, as amended by the order of August 17, 1998, that Plaintiffs' state law claims against the Commonwealth Defendants were dismissed without prejudice.

The Court of Appeals, in so many words, in its opinion of July 15, 1999, ordered the lower court to clarify the record through preparation of an appropriate order explaining the rationale for its apparent refusal to adjudicate common law and state claims under its pendent jurisdiction – if that in fact was the lower court's intention, as expressed in the first order to dismiss.

The Court of Appeals was apparently completely in the dark as to the meaning of the lower court's first order dismissing the state and common-law claims against the Commonwealth Defendants, without prejudice.

The district court in the order written on remand did nothing more than state that it declined to exercise supplemental jurisdiction over Plaintiffs' common-law and state claims against Defendants Wozniak and Holler in their

individual capacities, and dismissed those claims without prejudice, pursuant to Fed. R. Civ. P. 12(b)(1).

The Third Circuit Court of Appeals held in Sparks v. Hershey, 661 F2d 30 (3rd Cir. 1981), that where the district court does not set forth a persuasive, reasoned elaboration for dismissing state claims, the dictates of federal economy, fairness to parties and comity are better served by recognizing pendent jurisdiction. The district court committed clear error in declining to exercise supplemental jurisdiction over pendent state law claims without providing written reasons, as requested, so as to allow the Court of Appeals to determine whether the district court relied on permissible factors in declining to exercise such jurisdiction. Unless the district court properly invokes statutory categories for declining to assert supplemental jurisdiction in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted over pendent claims. 28 USCA §1367(c). See Carnegie-Mellon University v. Cahill, 108 S. Ct. 614 (1988); and see Letino v. Fringe Employee Plans, Inc., 611 F.2d 474, 478 (3rd Cir. 1979). The district court refused to exercise supplemental jurisdiction over the appellants' remaining claims and its failure to articulate its reasons for doing so as required by Sparks constituted an abuse of discretion. The Court of Appeals remanded for clarification of the record because it could not know, given the state of the record, whether or not the district court intended to decline to exercise its supplemental jurisdiction; it certainly could not determine without a written explanation from the district court what considerations enumerated in Section 1367(c) were relied on by the district court. The lower court's dismissal was never clearly based on a statutorily enumerated basis for declination of jurisdiction. This was error. Such an order should not have been summarily affirmed by the Court of Appeals given the fact that it specifically remanded for clarification of the record, and no such clarification of the basis for declination of jurisdiction was ever created by the district court. Dismissal of a federal claim does not deprive

a court of the constitutional power to hear pendent claims. Supplemental jurisdiction must be exercised in the absence of any of the four factors of Section 1367(c): "After establishing that supplemental jurisdiction encompasses 'other claims' in the same case or controversy as a claim within the district court's original jurisdiction, §1367(a), the statute confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise . . ." City of Chicago v. International College of Surgeons, 118 S. Ct. 523, 533, 534 (1997) (emphasis supplied). The statute makes clear that if power is conferred under Section 1367(a), and its exercise is not prohibited by Section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in Section 1367(c) applies. It is improper for the appellate court to summarily, in response to a Rule 27 Motion, preclude the appellants from raising this issue in their appeal of the district court's orders on remand.

The Third Circuit Court of Appeals is in conflict with its own decisions, with statutory authority, and with U.S. Supreme Court precedent on this subject.

It is important that the general public feel that statute and precedent have meaning when a legal question is presented to a circuit court. For these reasons, the Court of Appeals' decisions should be reviewed.

C. It is beyond dispute that the United States was not a party to the appeal of orders challenged by Petitioners at No. 00-1460 after vacatur and remand, and the Court of Appeals lacked jurisdiction to entertain or affirm a motion for summary disposition of these orders by a non-party to the appeal.

The orders sought to be reviewed by Petitioners at No. 00-1460 did not involve the United States.

The United States had motioned on November 25, 1998, to partially dismiss the previous appeal at No. 98-3494 for lack of appellate jurisdiction, on grounds that the only order (the order of August 25, 1998, defining the scope of a contempt hearing) involving the United States in that appeal was interlocutory in nature.

The Court of Appeals summarily affirmed this motion for partial dismissal of the appeal and eliminated the United States as a party.

Pursuant to Local Appellate Rule 27.4, only a party to an appeal may move for summary disposition of an appeal. The United States was eliminated as a party to the appeal at No. 98-3494 on its own motion as affirmed by the Third Circuit.

The new set of orders on appeal after vacatur and remand at No. 00-1460 did not involve the United States; only the Commonwealth Defendants were parties to these orders.

Because the United States was not a party to petitioners' appeal at No. 00-1460, the Third Circuit lacked jurisdiction to entertain a motion for summary affirmance of the lower court's orders from the United States; non-parties lack standing to intervene in consideration of the merits of an appeal.

It offends both against common sense and the basics of due process for the Court of Appeals to affirm a motion for summary disposition of an appeal from a non-party to that appeal, when the Court lacked jurisdiction to entertain such a motion. The United States acknowledged in its Reply Memorandum of August 23, 2000, that the order from which Petitioners appealed involved only the Commonwealth Defendants. Nevertheless, the United States went on to

conduct itself like a badge-heavy traffic cop who is overly exuberant in his job, shoots first, and plants excuses later. The Third Circuit would be the first court in the land to countenance entertainment and affirmance of a Rule 27 Motion for summary disposition submitted by a non-party to an appeal. This is a maneuver that is encouraged neither by precedent nor by statutory authority; it certainly is not sanctioned by other functioning circuit courts of appeal.

The Third Circuit's disagreement with every other appellate court in the country about this specific legal question should be reviewed in the public interest, and as a matter of judicial discretion. It presents an issue of importance beyond the particular facts and parties involved, and implicates the right to full review of contested legal issues on their merits, as opposed to implosion or falling in on itself of every thought of fairness.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: February 14, 2000.

Respectfully submitted,

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APPENDIX

APPENDIX A	OPINION AND JUDGEMENT FROM THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 15, 1999
APPENDIX B	U.S. DISTRICT COURT ORDER OF APRIL 18, 2000
APPENDIX C-1	U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT'S ORDER OF SEPTEMBER 13, 2000 GRANTING SUMMARY AFFIRMANCE OF THE COMMONWEALTH OF PENNSYLVANIA'S RULE 27 MOTION FOR SUMMARY AFFIRMANCE OF THE DISTRICT COURT ORDERS OF APRIL 18, 2000
APPENDIX C-2	U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT'S ORDER OF SEPTEMBER 13, 2000 GRANTING SUMMARY AFFIRMANCE OF THE UNITED STATES RULE 27 MOTION FOR SUMMARY AFFIRMANCE OF THE DISTRICT COURT ORDERS OF APRIL 18, 2000
APPENDIX D	U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT'S ORDER OF NOVEMBER 17, 2000 DENYING THE PETITION FOR REHEARING

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3494

ROBERT W. GRINE, II; JOANNE D. GRINE;
and Estate of MARGARET M. GRINE,
Appellants

v.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, et ux.; ROTOCAST PLASTIC; ESSEX ENV. IND. INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in and individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, Deceased; USA ENV PROTECTION; MICHAEL McCABE, Regional Administrator, Region III, U.S. EPA.,

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APPEAL FROM THE UNITED STAES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 95-cv-00342)
District Judge: Honorable Sean J. McLaughlin

Argued May 4, 1999
Before: ALDISERT, WEIS and STAPLETON, Circuit Judges
Filed: July 15, 1999

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OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiffs, Robert W. Grine, II, his wife Joann, and his mother Margaret (now deceased), owned and lived on property in Tionesta Borough, Pennsylvania. Their land adjoined a tract owned at one time by defendant William R. Coombs (now deceased). In the spring of 1993, hazardous waste allegedly migrated to the plaintiffs' property from barrels located on Coombs' tract, causing damage to their land and living environment.

In December 1995, plaintiffs filed suit in the Untied States District Court for the Western District of Pennsylvania. In April 1996, they amended their complaint to assert causes of action under the Resource, Conservation, and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., the Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251, et seq., and the Comprehensive Environmental

Response Compensation and Liabilities Act ("CERCLA"), 42 U.S.C. § 9601, et seq. In addition, the amended complaint listed counts under the Freedom of Information Act, state common law, and the Pennsylvania Hazardous Sites Cleanup Act, 35 P.S. § 6020.101, et seq.

Plaintiffs sued parties who owned the Coombs' land and the offending barrels. Also named were those who later moved the waste to an unknown site or those who increased the waste run-off after plaintiffs sought aid from state and federal environmental officials. Defendants included the Pennsylvania Department of Environmental Protection, and two of its officials, Gary Wozniak and Daniel Holler ("Commonwealth defendants"), as well as the Regional Administrator of the United States Environmental Protection Agency.

On December 31, 1996, citing Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the District Court dismissed the claims against the Commonwealth defendants as immune from suit under the Eleventh Amendment. Although according to the caption, plaintiffs purported to sue Wozniak and Holler in their individual capacities, the Court observed that the substance of the amended complaint equated them with the state agency and did not refer to any action taken in an individual capacity. Accordingly, the claims were actually against the Commonwealth, triggering its constitutional immunity.

The District Court noted that Ex parte Young, 209 U.S. 123 (1908), would otherwise permit claims for prospective injunctive relief against state officials. Here, however, the amended complaint described only past activity, failed to allege continuing federal violations and requested damages, a form of relief unavailable under Ex parte Young. Moreover, plaintiffs were apparently complaining that Wozniak and Holler has not adequately

enforced the environmental laws, a discretionary decision beyond the reach of Ex parte Young.

Finally, citing Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), the District Court held that the Eleventh Amendment additionally deprived it of jurisdiction over the state law claims asserted against the Commonwealth defendants. Accordingly, the District Court dismissed all claims against them with prejudice. Plaintiffs' appeal to this Court was dismissed for lack of appellate jurisdiction because no final order had been entered under Rule 54(b).

Plaintiffs then filed a Motion for Reconsideration in the District Court, and on August 17, 1998, the prior order was modified to provide that the plaintiffs' state law claims against the Commonwealth defendants would be dismissed "without prejudice." Again, however, the District Court rejected the plaintiffs' contentions that they were entitled to relief under Ex parte Young. The Court reasoned that plaintiffs suffered no harm from the officials' actions in assisting in the removal of hazardous substances from the Coombs' property. Consequently, they lacked standing to assert a violation of the RCRA. The Court left intact its prior decision to dismiss the federal claims against the Commonwealth defendants with prejudice.

In this appeal, in an effort to invoke Ex parte Young, plaintiffs contend that certain actions of Wozniak and Holler - particularly engaging in the illegal handling, storage and transport of hazardous substances - do not amount to conduct within the scope of their official duties. In addition, plaintiffs complain that because the officials failed to abate the contamination, it presents a continuous threat to their property. This, they contend, amounts to the continuing violation of federal law necessary to invoke Ex parte Young.

I.

The Eleventh Amendment provides that "[t]he judicial power of the Untied States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. A meritorious claim of Eleventh Amendment sovereign immunity, while not purely jurisdiction, is often dismissed under Fed. R. Civ. P. 12(b)(1). See 5A Wright & Miller, Federal Practice and Procedure § 1350 (1990 & 1999 Supp.).

The rulings in this case were predicated on two different procedural rules, 12(b)(1) and 12(B)(6). There is some distinction between them that the parties have not observed - for example, that Rule 12(B)(1) addresses jurisdictional objections and Rule 12(b)(6), failure to state a claim. We will first address the dismissal on quasi-jurisdictional grounds under Rule 12(b)(1) based on Eleventh Amendment immunity. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997).

The Pennsylvania Department of Environmental Protection is an agency of Pennsylvania and as such, shares the sovereignty of the state. Accordingly, it may not be sued on claims arising under federal environmental laws in federal court by a citizen of Pennsylvania. See Allegheny County Sanitary Authority v. United States Environmental Protection Agency, 732 F.2d 1167, 1174 (3d Cir. 1984). We see no need to repeat the District Court's correct analysis applying Eleventh Amendment immunity to the state agency as well as to Wozniak and Holler in their official capacity.

We do not agree, however, that the dismissals should have been with prejudice. As we have said, "[a] dismissal for lack

of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily, such a dismissal is 'without prejudice.'" Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3d Cir. 1980). See also In re: Orthopedic "Bone Screw" Products Liability Litigation, 132 F.3d 152, 155 (3d Cir. 1997) (if a court lacks subject matter jurisdiction, disposition of the case is to be without prejudice.). A dismissal premised on Eleventh Amendment immunity implicates jurisdictional factors sufficient to convince us that these dismissals should have been without prejudice. See Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996).

Of course, a dismissal with prejudice is of no collateral consequence if no other court is able to entertain the claims. We note, however, that one Court of Appeals has concluded that federal court jurisdiction is not exclusive under the RCRA. See Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998). But see Alden v. Main, ___ U.S. ___, No. 98-436, 1999 WL 412617 (June 23, 1999). Although we have not been called upon to decide that issue, and need not do so here, at a minimum - because of the jurisdictional uncertainty within this Circuit and the state - the order of the District Court should be modified to state that the dismissal under Rule 12(b)(1) based on the Eleventh Amendment immunity of the Commonwealth defendants is "without prejudice."

We do agree, however, that the District Court properly found the Ex parte Young exception inapplicable. The plaintiffs' amended complaint recites past activity and hence, fails to set out claims amendable to prospective injunctive relief. Moreover, the decision and means utilized to enforce the environmental laws are discretionary actions, not the type of ministerial activity contemplated by Ex parte Young. See 209 U.S. at 158-59.

II.

In their brief to this Court, plaintiffs cite Scheuer v. Rhodes, 416 U.S. 232 (1974), for the proposition that a District Court should not dismiss damages actions against state officials sued in their individual capacities based only on information provided in the complaint. We do not agree with the plaintiffs' broad generalization, however. To our mind, Rule 12(b)(6) is applicable to claims of this nature as it is to any other.

Here, the District Court examined the prolix amended complaint, which consisted of some 163 paragraphs setting forth evidentiary material in great detail. As noted, the District Court concluded that plaintiffs had not alleged derelictions by Wozniak and Holler in their individual capacities. Plaintiffs now direct our attention to certain paragraphs which, they assert, do single out actions taken by Wozniak and Holler outside or beyond their official capacity in dealing with the waste on the Coombs' property.

We have closely examined those specific allegations, but conclude that the District Court was justified in reading the amended complaint as it did. However, in the interest of finality, we will assume that plaintiffs have asserted damage claims under the federal environmental statutes against Wozniak and Holler in their individual capacities and proceed to examine these claims.

We held in Allegheny County Sanitary Authority that the Clean Water Act provides a comprehensive plan of enforcement that limits remedies to those provided by the Act. See 732 F.2d at 1175 (examining 33 U.S.C. § 1365(a)). The RCRA and CERCLA are drafted with similar language. See 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(a). Those statutes do not provide plaintiffs with a private cause of action

against Wozniak and Holler in their individual capacities. Hence, even if the amended complaint could be read as plaintiffs urge, those claims were properly dismissed under Rule 12(b)(6) with prejudice.

Although in some instances a dismissal under Rule 12(b)(6) is without prejudice and thus subject to amendment, a plaintiff may choose to stand on the allegations of the complaint. Plaintiffs have chosen that path -- they appealed to this Court in 1997 relying on the language of their amended complaint, failed to request leave to amend after entry of the December 31, 1996 order, and maintained during oral argument before this Court that they continued to stand by those allegations.

We note, however, that some of the allegations directed against Wozniak and Holler seemingly do assert violations of state statutory and common law. As such, they are pendent claims which a District Court may dismiss when it disposes of the federal claims before it. See United Mine Workers v. Gibb., 383 U.S. 715, 726-27 (1966); see also 28 U.S.C. § 1367(c). The record in this case is not absolutely clear, but we gather that the District Court, in its amended order dismissing the state claims without prejudice, intended to exercise its discretion to decline jurisdiction over those pendent claims.

To clarify the record, we will remand this case to the District Court so that it may prepare appropriate orders:

(1) dismissing the plaintiffs' claims against the state agency and Wozniak and Holler in their official capacity without prejudice under Rule 12(b)(1);

(2) dismissing the plaintiffs' claim for damages against Wozniak and Holler in their individual capacity under the Clean Water Act, RCRA, and CERCLA with prejudice under Rule 12(b)(6); and

(3) declining to adjudicate the plaintiffs' common law and state claims under its pendent jurisdiction (if that is the District Court's intention).

III.

Plaintiffs also complain that the District Court erred in excluding the Commonwealth defendants from a contempt hearing. The District Court did so for two reasons: 1) because the Commonwealth defendants had been dismissed already from the case, and 2) because plaintiffs had failed to establish that the Commonwealth defendants violated any specific court order.

To establish civil contempt, plaintiffs must prove by clear and convincing evidence that (1) a valid order existed; (2) defendants knew of the order; and (3) defendants disobeyed the order. See Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). Plaintiffs, however, although they allege oral direction of the District Court, fail to point to an order of the type necessary to support civil contempt. See Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995). Accordingly, we find no error and affirm the order of the District Court excluding the Commonwealth defendants

from the contempt hearing. The case will be remanded to the District Court for further proceedings in conformance with this opinion.

TO THE CLERK:

Please file the foregoing Opinion.

/s/ Ruggero J. Aldisert
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al.,	)	
Plaintiffs,	)	
	)	Civil Action No. 95-342 Erie
v.	)	
	)	
WILLIAM R. COOMBS, et al.,	)	
Defendant.	)	

ORDER

AND NOW, this 18th day of April, 2000, in accordance with the July 15, 1999 Memorandum Opinion and Judgement issued by the Third Circuit Court of Appeals in the above-captioned matter,

IT IS HEREBY ORDERED that this Court's previous orders of December 31, 1996 and August 17, 1998 are modified and/or clarified to provide as follows:

1) Plaintiffs' claims under the Resource, Conservation, and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., the Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251 et seq., and the Comprehensive Environmental Response Compensation and Liabilities Act ("CERCLA"), 42 U.S.C. § 9601, et seq., against Commonwealth Department of Environmental Protection and Defendants Wozniak and Holler in their official capacities are DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(1);

2) To the extent Plaintiffs' have asserted claims under RCRA, the Clean Water Act, and CERCLA for damages against Defendants Wozniak and Holler in the individual capacities, said claims are DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(6); and

3) The Court declines to exercise supplemental jurisdiction over Plaintiffs' common law and state claims against Defendants Wozniak and Holler in their individual capacities and, accordingly, those claims are DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(1).

/s/_____
Sean J. McLaughlin
United States District Judge

cm: All counsel of record: /s/TH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 2, 2000
E-1
***AMENDED August 24, 2000**

No. 00-1460

GRINE

V.

COOMBS

ROBERT W. GRINE, JOANNE D. GRINE and
ESTATE OF MARGARGET M. GRINE,
Appellants

(D.C. civil no. 95-342 Western District of PA (Erie) (SJM)

Present: SLOVITER, MANSMANN and GREENBERG, Circuit Judges

1. Motion by Appellees for Summary Affirmance

2. Response by Appellants to Appellees' Motion For Summary Affirmance

*3. Reply by Appellees to Appellants' Response to Motion for Summary Affirmance

See B-96

/s/_____
Tika L. Parks
Case Manager (267) 299-4929

ORDER

The foregoing motion for summary affirmance is granted and the order appded(sp.) is affirmed.

By the court,

/s/ _____
Circuit Judge

Dated: SEP 13 2000

/s/tep/cc: JSH
JMP
TAW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 22, 2000
E-13
*AMENDED 9/1/00

No. 00-1460

GRINE

V.

COOMBS

ROBERT W. GRINE, JOANNE D. GRINE and
ESTATE OF MARGARGET M. GRINE,
Appellants

(D.C. civil no. 95-342 Western District of PA (Erie) (SJM)

√

Present: SLOVITER, MANSMANN and GREENBERG, Circuit Judges

1. Motion by Appellees Commonwealth of Pennsylvania Department Of Environmental Protection, Daniel Holler, and Gary Wozniak For Summary Affirmance and Withdrawal of Appellees' Motion to Dismiss

*2. Response by Appellants to Appellees' Motion For Summary Affirmance

/s/_____
Tika L. Parks
Case Manager (267) 299-4929

C-2-1

ORDER

The foregoing motion to dismiss is deemed withdrawn. The motion for summary affirmance is granted and the order appded(sp.) is affirmed.

By the court,

/s/_____
Circuit Judge

Dated: SEP 13 2000

/s/tep/cc: JSH
JMP
TAW

UNITED STATES COURT OF APEALS
FOR THE THIRD CIRCUIT

No. 00-1460

ROBERT W. GRINE, II, JOANNE D. GRINE,
and ESTATE OF MARGARET M. GRINE,
Appellants

v.

WILLIAM R. COOMBS et al.

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGARRD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and GREENBERG* Circuit Judges

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/_____
Circuit Judge

Dated: NOV 17 2000
/s/tep/cc JSH, JMP, TAW

Supreme Court, U.S.
FILED

(2) 001445 MAR 9 2001

OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);BRADLEY M. CAMPBELL, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

SUPPLEMENTARY APPENDIX

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Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine

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49 pp

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al., Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al., Defendants	)	

MEMORANDUM OPINION

McLAUGHLIN, J.

This case involves allegations by Plaintiffs Robert W. Grine, II, Joanne D. Grine and Mrs. Margaret Grine that Defendants,[1] several public and private entities, are responsible for contamination of the Grines' property. The Amended Complaint, filed April 2, 1996, asserts nine causes of action against Defendants, including federal claims under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901, et seq., the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251, et seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 et seq., as amended

[1] The named Defendants are: William R. Coombs; Billie M. Yost; Jack W. Shrum, et ux.; Rotocast Plastic Products, Inc.; Essex Environmental Industries, Inc.; Tionesta Borough; Ronald Hall individually and in his official capacity as President of the Tionesta Borough Council; Scott Daum, individually and in his official capacity as Borough Manager; Commonwealth of Pennsylvania, Department of Environmental Protection; Gary Wozniak, individually and in his official capacity as an agent of the Pennsylvania DEP; Daniel Holler, individually and in his official capacity as Emergency Response Coordinator for the Pennsylvania DEP; United States of America Environmental Protection Agency; and Michael McCabe, Regional Administrator, Region III, for the United States EPA.

by the Superfund Amendments and the Reauthorization Act of 1986.[2] The Amended Complaint also asserts causes of action under Pennsylvania common law theories of intentional infliction of emotional distress, trespass, nuisance, and strict liability, as well as an alleged violation of the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, § 6020.101 et seq. (Purdons 1993 and 1996 Supp.).

Presently pending before the court is a motion to dismiss filed on behalf of Defendants the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP"), Gary Wozniak, and Daniel Holler (collectively, the "Commonwealth Defendants"). For the reasons stated below, we will grant the motion to dismiss.

I. BACKGROUND

The Court will outline only those allegations relevant to the claims against the Commonwealth Defendants, except where a broader background discussion is helpful for context.[3]

A. The Parties

Plaintiff Robert W. Grine, II is a resident of Tionesta Borough, Pennsylvania. (Amended Complaint, hereinafter "AC," at ¶ 4.) Plaintiff Joanne D. Grine is his wife and Plaintiff Margaret M. Grine is his mother. (Id. at ¶¶ 5-6.) The Grines reside together on a tract of property located

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[2] Plaintiffs also asserted a claim against the United States Environmental Protection Agency and its Region III Director, Michael McCabe, under the Freedom of Information Act, 5 U.S.C. § 552. The Court has addressed Plaintiffs' claims against the EPA and McCabe by way of a separate Memorandum Opinion and Order.

[3] For purposes of Defendants' motion, we construe all allegations in the Complaint as true and draw all reasonable inferences therefrom in the light most favorable to the plaintiff.

adjacent to what they allege is an illegal open dump site. (Id. at ¶¶ 4-6.)

Defendant William R. Coombs ("Coombs") is the landowner of record holding title to the camp site and cabin adjacent to the Grines' property. (AC ¶ 15.) It is this property which is alleged to be the source of an illegal hazardous waste disposal site (the "Site"). (Id.) Defendant Billie M. Yost ("Yost") is the daughter of William Coombs and is the current title holder of record of a tract of property located adjacent to the Grines' property and previously owned by Coombs. (Id. at ¶ 16.) Defendant Jack W. Shrum, et ux. ("Shrum") is also the title holder of a tract of property located adjacent to the Grines' property and previously owned by Coombs. (Id. at ¶ 17.)

Defendant Rotocast Plastic Products, Inc., Wonder Products Division ("Rotocast") is a corporate successor in interest to Essex Environmental Industries, Inc. and is alleged to have participated in the handling, storage, transportation, treatment and/or disposal of solid waste at the Coombs site. (AC ¶ 7.)

Defendant Daniel Holler ("Holler") is the Emergency Response Coordinator of the Northwest Region of the Pennsylvania Commonwealth Department of Environmental Protection ("DEP"). (AC ¶ 10.) Defendant Gary Wozniak ("Wozniak") is the DEP agent allegedly in charge of investigating the Grines' complaint filed with the DEP. (Id. at ¶ 11.) Plaintiffs have also named the DEP itself as a Defendant in this case. (Id. at ¶ 9.) We refer to these Defendants collectively as "the Commonwealth Defendants."

Defendant Scott Daum ("Daum") is the Borough Manager of Tionesta Borough Council. (AC ¶ 13.) Defendant Ronald Hall ("Hall") is the President of Tionesta Borough Council. (Id. at ¶ 14.) Plaintiffs have also named

the Tionesta Borough Council as a Defendant in this action. (Id. at ¶ 12.)

B. The Alleged Operative Facts

The essence of Plaintiffs' Amended Complaint is that hazardous waste has been illegally transported, stored, handled, and/or disposed f on Coombs's property (recently conveyed to Yost and Shrum) and has migrated through surface and subsurface water and soil to the Grines' property, causing them both personal harm and property damage. (See AC ¶ 18.)

In the spring of 1993, Robert and Joanne Grine allegedly observed approximately one-half dozen yellow plastic drums sitting in plain view on the camp site owned by Coombs. (AC ¶ 19.) Plaintiffs claim that, in June and July 1994, Robert Grine notified the Pennsylvania Department of Environmental Resources ("DER")[4] and members of the Tionesta Borough Council that raw sewage was draining from the Coombs's property onto his property via a pipe connected to a toilet in the Coombs's cabin. (Id. at ¶ 20.) In addition, Robert Grine allegedly notified the DER on August 13, 1994 that a mass of foaming liquid had surfaced out of his wet-weather spring, traversing his entire property. Plaintiffs noticed, approximately ten days thereafter, that vegetation and small animals were dying in close proximity to the path of the spill. (Id. at ¶ 22.)

In October, 1994 Plaintiff Robert Grine submitted water samples from his wet-weather spring to an independent testing operation by the name of Stewart Laboratories of Strattanville, Pennsylvania. (AC ¶ 23.) Plaintiffs claim that some 58 volatile organic chemicals were found to be present in heavy concentrations in the samples. (Id.) According to Plaintiffs, personnel from Stewart

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[4] The Department of Environmental Resources was officially renamed the "Department of Environmental Protection" effective July 1, 1995. See PA. STAT. ANN. tit. 71, § 1340.501 (Purdons 1996 Supp.).

Laboratories advised that the Grines had an extremely dangerous situation on their property and directed Robert Grine to inform the DER and the county emergency manager that an emergency response should be initiated. (Id. at ¶ 24.) Mr. Grine did so and, approximately four to five days later, agents of the DER arrived at the Site. (Id. at ¶ 25.) Plaintiffs allege that, in the interim, Defendant Wozniak threatened Robert Grine with a retaliatory prosecution if Plaintiffs insisted in filing their complaint and insisted on initiating a site investigation. (Id.)

Plaintiffs claim that, on or about October 4, 1994, Defendant Wozniak videotaped a yellow plastic drum and lid in plain view on the Coombs site. (AC ¶ 26.) Embossed on the drum and lid were a designation "DOT-E9775" and the name and address of Essex Environmental Industries, Inc.. (Id.)

Plaintiffs further claim that, on or about November 22, 1994, Agent Wozniak informed them that one of the yellow plastic drums had been dragged by Defendant Coombs into his cabin, where it was in use as a water reservoir that flushed a primitive toilet inside Coombs's cabin. (AC ¶ 27.) One of several pipes running from the toilet allegedly emptied into a septic tank with no leach field and discharged directly onto the Grines' property. (Id. at ¶ 28.)

Plaintiffs claim that they requested they DER, through Agent Wozniak, to prevent the use of these barrels to discharge hazardous chemicals and sewage directly onto their property. (AC ¶ 29.) Meanwhile, the Grines allegedly suffered symptoms of physical distress, impaired quality of life, and destruction to their property as a result of the contamination of their property. (Id. at 30.)

Plaintiffs claim that, on or about June 1 and June 7, 1995, the barrels on the Coombs property were filled with fluids which foamed over the sides of the barrels and

blackened the ground on the Coombs property. (AC at ¶ 33.) They state that, with every heavy rainstorm throughout the Spring and Summer of 1995, liquid waste would rise up from the Grines' spring and flood their back yard, creating a stench which would invade their home. (Id. at ¶ 34.)

On July 5, 1995, Robert Grine allegedly informed Agent Wozniak that the barrels were being moved off the Coombs camp site by Coombs and others, using a cable and winch. (AC ¶¶ 31-32.) Plaintiffs claim that, during this conversation, Agent Wozniak denied ever having seen any barrels on the Coombs site. (Id. at ¶ 32.)

On February 9, 1995 a criminal investigator for the United States EPA arrived at the Coombs site and allegedly inspected the lid of the drum bearing the mark "DOT-E9775." (AC at ¶ 36.) The EPA released to Plaintiffs the results of testing done on samples taken from barrels on the Coombs site in a report dated March 17, 1995. According to Plaintiffs', the results of these tests showed the presence of the same chemicals detected in heavy concentrations by Stewart Laboratories in samples taken from the Grines' spring water. (Id. at ¶ 38.) Nevertheless, the EPA concluded its investigation with a determination that no remediation of the Grines' property was necessary. (Id. at ¶ 35.)

On or about June 29, 1995, agents of the Pennsylvania DER allegedly supervised a private contractor, Mr. Shaun Passauer, in the removal of contaminated soil from the Coombs site. (AC ¶ 41.) Plaintiffs claim that Mr. Passauer removed the soil with a backhoe, pushed barrels and other debris into waste piles, and graded the slope from the Coombs property so that all the runoff would be channelled directly onto the Grines' property. It is alleged that various Borough employees were present and the events were videotaped by the DER. Plaintiffs aver that contaminated soil and drums were removed from the Coombs site in the presence of DER and Borough officials and transported without a permit to unknown locations. (Id.)

On August 25, 1995, agents of the DER appeared at Plaintiffs' home without any attempt to contact their counsel and urged immediate entry onto Plaintiffs' property in order to remediate the contaminants on the property. (AC at ¶ 42.) Plaintiffs complaint that, in a "draft" version of a Hazardous Sites Cleanup Act Response Justification Document dated August 29, 1995, the Pennsylvania DEP named Plaintiff Robert Grine as a potentially responsible person and also identified him as a current and past "Site owner." (Id. at ¶ 43.) Plaintiffs claim that Defendant Coombs, Yost, Shrum, and Rotocast are not alluded to by name anywhere in the document and are not identified as "Site owners." (Id.)

Plaintiffs aver that Defendants Coombs, Yost, Shrum, and Rotocast have acted to create, implement, operate and fuel a "chemical buriel [sic] ground[]" adjacent to Plaintiffs' home, with the intent to physically injure Plaintiffs and cause them severe emotional distress and a complete disruption of their daily lives. (AC ¶ 45.)

II. STANDARD OF REVIEW

In evaluating Plaintiffs' claims for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b) (6), the Court must accept as true all material allegations of the complaint and draw all reasonable inferences therefrom in the light most favorable to the Plaintiffs. Rocks v. City of Philadelphia, 868 F.2d 644, 647 (3d Cir. 1989). We thus consider "whether relief could be granted . . . 'under any set of facts that could be proved consistent with the allegations' in [the] complaint." Gasoline Sales, Inc. v. Aero Oil co., 39 F.3d 70, 71 (3d Cir. 1994) (quoting National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 114 S. Ct. 798, 803 (1994)). If no cause of action can be identified, dismissal is proper.

Dismissal under Fed. R. Civ. P. 12(b) (1) for lack of subject matter jurisdiction is appropriate only if the right claimed is "so insubstantial, implausible, foreclosed by prior

decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1280-81 (3d Cir. 1993) (citations omitted). "The threshold to withstand a motion to dismiss under Fed. R. Civ. P. 12(b) (1) is thus lower than that required to [with]stand a Rule 12(b) (6) motion." Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989). See also Bonnett Enterprises, Inc. v. United States, 889 F. Supp. 208, 209-10 (W.D. Pa. 1995). The plaintiff generally bears the burden of persuasion on a motion under Rule 12(b) (1). Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991).

III. DISCUSSION

The Commonwealth Defendants put forth several bases for dismissal of the Amended Complaint. Specifically, they assert that: (A) they are immune from suit (whether based on federal or state law claims) in federal court by virtue of the Eleventh amendment to the U.S. Constitution; (B) the Plaintiffs have stated no cause of action under federal law and, therefore, this Court is without subject matter jurisdiction; (C) the Plaintiffs failed to satisfy the notice of suit jurisdictional prerequisites under RCRA, the Clean Water Act, and CERCLA; and (D) the Amended Complaint fails to comply with the Federal Rules of Civil Procedure.

A. Eleventh Amendment Immunity[5]

We first consider whether some of all of the Commonwealth Defendants are immune from suit under the

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[5] While the plaintiff generally bears the burden of establishing this Court's jurisdiction on a motion to dismiss under Fed. R. Civ. P. 12(b) (1), see supra at II, a party asserting Eleventh Amendment immunity (and standing to benefit from its protection) bears the burden of proving the applicability of that doctrine. Christy v Pennsylvania Turnpike Comm'n., 54 F.3d 1140, 1144 (3d Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 340 (1995). Thus, in the instant case, the Commonwealth Defendants bear the burden of proving their entitlement to protection under the Eleventh Amendment.

Eleventh Amendment to the United States Constitution. The Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Constitution, Amendment XI.[6] ""The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (citing Hans v. Louisiana, 134 U.S. 1, 13 (1980)). In fact, "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Id. (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

The Commonwealth Defendants correctly summarize the law in state that there are only two situations in which a state may be sued in federal court, consistent with the Eleventh Amendment: (1) where the State has waived its immunity and consented to suit, Puerto Rico Aqueduct & Sewer Auth., 506 U.S. at 144; Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 473 (1987) (plurality opinion); Clark v. Barnard, 108 U.S. 436, 447 (1983); and (2) where Congress has unequivocally expressed its intent to abrogate Eleventh Amendment immunity,

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[6] Although the Amendment refers only to suits against states brought by citizens of different or foreign states, it is now well established that this immunity applies also to suits brought by citizens of the defendant state. See, e.g., Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 97-98, 100 (1984); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

pursuant to a valid exercise of power. See Seminole Tribe of Florida v. Florida, __ U.S. __, 116 S. Ct. 1114, 1123 (1996); Welch, 483 U.S. t 473-74; Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 242 (1985).

1. Plaintiffs' Federal Claims

Turning first to Plaintiffs' federal claims, we find that the first situation does not pertain because there has been no waiver by the Commonwealth of its Eleventh Amendment immunity with respect to these claims. See 1 PA. CONS. STAT. ANN § 2310 (1995) ("[I]t is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity."); 42 PA. CONS. STAT. ANN. § 8521(b) (1982) ("Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.")

The second situation -- where Congress has acted to abrogate sovereign immunity -- also does not pertain here. This inquiry actually involves two questions: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' ... and second, whether Congress has acted 'pursuant to a valid exercise of power.'" Seminole Tribe of Florida v. Florida, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)). We think that, far from expressly abrogating Eleventh Amendment immunity, Congress specifically recognized and preserved such immunity in the "citizen suits" provisions of RCRA, CERCLA, and CWA. All three of these acts contain provisions for citizen suits against "persons." Further, each act's "citizen suits" provision defines "persons" who may be sued as including "any ... governmental instrumentality or agency, *to the extent permitted by the eleventh amendment to the*

Constitution." See 42 U.S.C. §§ 6972(a) (1) (RCRA) and 9659(a) (1) (CERCLA); 33 U.S.C. § 1365(1) (CWA) (emphasis supplied). This wording indicates that Congress did not intend to override Eleventh Amendment immunity in creating a mechanism for private suits under these statutes. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 10 (1988) (plurality opinion) (recognizing Congress's reservation of Eleventh Amendment immunity in citizens suit provision of CERCLA), overruled on other grounds, Seminole Tribe, 116 S. Ct. at 1128.

In any event, following the United States Supreme Court's decision in Seminole Tribe, it would appear that any Congressional abrogation of Eleventh Amendment immunity under RCRA, CWA, and CERCLA would be an invalid exercise of federal power. In Seminole Tribe, the Supreme Court considered whether a federal court had jurisdiction over a suit brought by the Seminole Indian Tribe against the State of Florida and its Governor under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.. That statute, enacted pursuant to the Indian Commerce Clause of Article I of the U.S. Constitution, provides that an Indian tribe may conduct certain gaming activities only in conformity with a valid compact between the tribe and the State in which the gaming activities are located. In Seminole Tribe, the Tribe had filed suit seeking to compel the State of Florida and its Governor to negotiate in good faith toward entering into such a compact. The defendants moved to dismiss the complaint on the ground that the suit violated the State's sovereign immunity from suit in federal court. Upon interlocutory appeal from the district court's denial of the motion to dismiss, the Eleventh Circuit Court of Appeals held that the Eleventh Amendment barred the suit.

The Supreme Court affirmed the Seventh Circuit's decision and held that, notwithstanding the clear expression of Congressional intent to abrogate the States' Eleventh Amendment immunity in the Indian Gaming Regulatory Act, Congress had not acted pursuant to a valid exercise of

power in attempting to do so. The Tribe argued that, consistent with the court's prior ruling in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), Congress could validly exercise its powers under the Indian Commerce Clause so as to render States subject to suit under the Act. In Union Gas, a plurality of the Court had held that Congress could abrogate state sovereign immunity in legislation enacted under the Interstate Commerce Clause of Article I of the U.S. Constitution. The Union Gas Court reasoned that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." 491 U.S. at 19-20. The Petitioners in Seminole Tribe urged the Court to follow its prior ruling in Union Gas and uphold the Indian Gaming Regulation Act's abrogation of sovereign immunity pursuant to the Indian Commerce Clause of Article I. The Court in Seminole Tribe acknowledged that "Union Gas allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." 116 S. Ct. at 1127. Nevertheless, the Court determined that the decision in Union Gas had been decided wrongly and should be overruled. Id. at 1128. The Court noted that, prior to Union Gas, it had previously found Congressional power to abrogate the States' sovereign immunity only under the Fourteenth Amendment. The Court pointed out that the rationale for finding this authority within the fourteenth amendment was "wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment." 116 S. Ct. at 1128. The Court concluded that the Tribe's suit should be dismissed for lack of federal jurisdiction and "reconfirmed" that:

> the background principle of state sovereign immunity embodied in the Eleventh amendment is not so ephemeral as to dissipate

> when the subject of the suit is an area, like the regulation of Indian Commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, *and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.*

116 S. Ct. at 1131-32 (internal footnote omitted) (emphasis supplied).

Applying Seminole Tribe to this case, there can be no valid abrogation of Eleventh Amendment immunity under RCRA, CWA or CERCLA. The Commonwealth Defendants note, and Plaintiffs do not disagree, that each of these statutes were enacted pursuant to Congress's authority under the Interstate Commerce Clause. See e.g., Union Gas, 491 U.S. at 13 (Congressional power to enact CERCLA provisions derives from the Commerce Clause); U.S. Ashland Oil & Transportation Co., 504 F.2d 1317, 1325-29 (6th Cir. 1974) (Congressional authority to prohibit discharge of pollutants under the CWA into navigable waters derives from the Commerce Clause). In light of Seminole Tribe's teaching that Congress lacks the power to abrogate Eleventh Amendment immunity under the Commerce Clause -- and, as there has not otherwise been any waiver by the Commonwealth of its sovereign immunity -- this Court lacks jurisdiction over any claims against the Commonwealth that are premised upon the citizen suits provisions of RCRA, CERCLA, or CWA. Accordingly, the DEP, which is merely an arm of the Commonwealth, is protected by Eleventh Amendment immunity and is outside this Court's jurisdiction. See Fiore v. Kelly run Sanitation, Inc., 609 F.

Supp. 909, 912 (W.D. Pa. 1985) ("We recognize that the state DER, an agency of the state itself, may not be sued in federal court unless the state has waived its Eleventh Amendment immunity or Congress has subjected states to suit pursuant to Section 5 of the Fourteenth Amendment.")

Plaintiffs argue that the citizen suits provision of RCRA, 42 U.S.C. § 6972(a), grants federal courts exclusive jurisdiction over claims brought pursuant to that section. Thus, Plaintiffs reason, if the eleventh amendment shields state officials who allegedly contribute to the release of hazardous substances from suit in federal court, "persons harmed by state violations of federal law would have no remedy." (Pl.'s Br. In Resp. to Commw. Def.s' Motion to Dismiss at 4.) This argument prompts us to make two observations. First, this Court is not free to disregard the dictates of the Eleventh Amendment even in situations where the plaintiff would otherwise be left without a remedy against a state entity. Indeed, the Supreme court has advised that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area" such that no corresponding state law remedy exists, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Seminole Tribe, 116 S. Ct. at 1131. Similarly, even where there is no state forum otherwise available to a plaintiff, we cannot entertain a suit against a state if doing so would violate the Eleventh Amendment. Second, as the Seminole Tribe Court recognized, other methods exist for ensuring state compliance with federal law: e.g. the Federal Government can bring suit against a State, see United States v. Texas, 143 U.S. 621, 644-45 (1892) (finding such power necessary to the "permanence of the Union"); an individual can bring suit against a state officer under certain circumstances in order to ensure that the officer's conduct is in compliance with federal law, see Ex Parte Young, 209 U.S. 123 (1908); and the Supreme Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit,

Cohens v. Virginia, 6 Wheat. 264, 5 L.Ed. 257 (1821)). See generally, Seminole Tribe, 116 S. Ct. at 1131 n. 14. We conclude that the Eleventh Amendment precludes this Court from exercising jurisdiction over Plaintiffs' federal claims against the DEP.

We next consider whether Defendants Holler and Wozniak are similarly entitled to Eleventh Amendment immunity. "When the suit is brought only against state officials, a question arises as to whether that suit is against the State itself." Pennhurst State School & Hosp. V. Halderman, 465 U.S. 89, 101 (1984). Eleventh Amendment immunity bars suits against state officials when "'the state is the real, substantial party in interest.'" Id. (quoting Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459, 464 (1945)). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam) (suit by State of Hawaii against Director of the Bureau of the Budget was one against the United States and, absent its consent, could not be maintained where the requested court order would require the Director to take affirmative official action, would affect the public administration of federal agencies, and would result in the disposition of property belonging to the United States). A suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in effect a suit against the state. Cory v. White, 457 U.S. 85, 89 (1982) (in federal interpleader action filed by estate of Howard Hughes to resolve inconsistent death tax claims by officials of two different states, suit against state tax officials was suit against state and, therefore, barred by doctrine of sovereign immunity). See also Dugan v. Rank, 372 U.S. 609, 620 (1963) {"[A] suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of judgment would be to restrain the Government from acting, or to compel it to act.").

The Commonwealth Defendants argue that Plaintiffs' claims against Holler and Wozniak are, in effect, nothing more than claims against the Commonwealth. Plaintiffs do not seriously contest this issue and, upon review of the Amended Complaint, we must agree with the Defendants' characterization of Plaintiffs' claims. We note, for example, allegations that:

> 10. ... *Daniel Holler [is] the emergency response coordinator of the Northwest Region, employee and agent of the [DEP]* ...
>
> 11. ... *Gary Wozniak [is] the DER/DEP agent who was in charge of investigating Plaintiffs' Complaint* ...
>
> ***
>
> 29. *The Grines family requested that the DER in the person of Agent Wozniak* prevent the use of DOT-exempted barrels to discharge hazardous chemicals and sewage directly onto their property.
>
> ***
>
> 41. On or about June 29, 1995, *agents of the DER/DEP* supervised a private contractor ... who used a backhoe to remove contaminated soil from the Coombs site ... All of these activities were videotaped by *agents of the DER*. Drums and contaminated soil were removed from the Coombs site *in the presence of DER* ... and transported without a permit to unknown locations ...
>
> 42. On August 25 19995, *agents of the DER* appeared at Plaintiffs[']home ... and urged Plaintiff to admit them immediately in order to "remediate" the contaminants on his property.
>
> ***
>
> 71. *the DER in the persons of Defendants Gary Wozniak and Daniel Holler* through their "hands-on" control of the Site, have contributed to the handling, storage, treatment, transport, or disposal of solid or hazardous waste without a permit.
>
> ***

86. *Plaintiffs seek injunctive relief against the [DEP], Region III, and their agents, servants, employees,* and those persons in active concert or participation with them *in order that the DER cease from its failure to enforce* [42 U.S.C. §6925(a), etc.] ...

87. *[the DEP] ... [is] in continuing violation of Section 301 of the Clean Water Act,* 33 U.S.. § 1311 ...

***

95. *The officers, agents and employees of the DER have aided and abetted* Defendants Coombs, Yost, Shrum and Defendant Rotocast Plastics, Inc. in their violations of the CWA ... *The [DEP] and their agents, servants, employees,* and those persons in active concert or participation with them continue in their failure to enforce the applicable provisions of the CWA ...

***

103. *The DEP in the persons of Defendant Wozniak and Holler* manifested an unjustifiable and inexcusable disregard for human life and through their conduct placed the Plaintiffs in danger of death or serious bodily harm.

104. *The DEP in the persons of Defendant Wozniak and Holler* significantly encouraged Defendant Coombs, Yost and Shrum and Defendant Rotocast in their illegal storage, transport and disposal of hazardous materials ...

***

136. *The DER in the person of the agent assigned to the Coombs Site, Gary Wozniak, and his supervisor, Daniel Holler,* were operators of a facility as that term is used in CERLCA ... and these agents arranged for the disposal of a hazardous substance at or from the Coombs site on or about June 29, 1995 ...

137. On or about June 29, 1995, agents of the DER actively supervised and videotaped the removal of drums and contaminated soil from the Coombs Site and their transport without a permit to unknown locations.

> *The DER in the person of its agents* arranged for the ultimate disposal of these hazardous materials without a permit. ...
>
> 138. *The DER in the person of its agents* had authority to control the cause of the contamination at the time hazardous substances were released into the environment. *The DER in the person of its agents* on or about June 29, 1995, caused or contributed to the release of a hazardous substance from drums and contaminated soil on the Coombs Site, and is subject to the provisions of CERCLA ...

(Amended Complaint ¶¶ 10, 11, 29, 41, 42, 71, 86, 87, 95, 103, 104, 136, 137, 138 (emphasis supplied).)

These allegations demonstrate that Plaintiffs' claims against Wozniak and Holler are, in effect, claims against the Commonwealth DEP itself. Although Holler and Wozniak are referenced in the caption both "in an individual and official capacity," the averments against them concern alleged actions taken as agents of DEP. The Amended Complaint does not contain any reference to those Defendants specifically acting in an individual capacity. Further, the Amended Complaint clearly equates the actions of Holler and Wozniak with the actions of the DEP itself. The alleged wrongful acts -- i.e. alleged failure to terminate illegal transportation of hazardous waste, alleged failure to investigate the generation, origin, ownership, transportation, storage and disposal of overpacked drums, alleged failure to test the contests of the drums or reveal the results of the tests, and alleged supervision of the removal and transfer of hazardous waste - all concern activities clearly within the scope of the agents' official duties. Under these circumstances, any judgment in favor of Plaintiffs would operate against the DEP itself. The relief requested by Plaintiffs, if granted, would affect matters of public administration and would essentially compel the Pennsylvania DEP to take action. For these reasons, we

agree with the Commonwealth Defendants that the claims against Defendants Wozniak and Holler are, in actuality, claims against the DEP -- and hence, the Commonwealth. Accordingly, these claims are barred by the Eleventh Amendment unless the claims against Holler and Wozniak are sufficient to fall within the narrow exception of Ex Parte Young, 209 U.S. 123 (1908).

Under the doctrine set forth in Ex Parte Young, Eleventh Amendment immunity may be lifted where a claim is brought against a state official seeking only prospective injunctive relief in order to prevent the enforcement of an unconstitutional law, or to end a continuing violation of federal law by the official. Green v. Mansour, 474 U.S. 64, 68 (1985) (citing Ex Parte Young, 209 U.S. at 155-56); Edelman v. Jordan, 415 U.S. 651, 664 (1974). We conclude that such relief is not available here for several reasons.

First, the doctrine of Ex Parte Young affords only prospective injunctive relief, as opposed to retrospective monetary relief. This is so because prospective injunctive relief is considered "necessary to vindicate the federal interest in assuring the supremacy of that law," but "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Green, 474 U.S. at 68. In their Amended Complaint, Plaintiffs seek specific injunctive relief as against Defendant Rotocast only. (See Amended Complaint Ad Damnum Clause at ¶ A.) Beyond that, Plaintiffs' only prayer for prospective injunctive relief is the generic request that "Plaintiffs be awarded any and such other legal and equitable relief as this Court deems just and proper." (Id. at ¶ J.) The amended Complaint does not specifically identify any form of prospective relief as against the Commonwealth Defendants that would be appropriate under Ex Parte Young. In particular, Plaintiffs fail to identify any prospective unconstitutional conduct or continuing violations of federal law on the part of the Commonwealth Defendants. Even construing Plaintiffs' allegations as true and drawing all

reasonable inference in their favor, we perceive no allegation of a continuing federal violation; all averments relating to the Commonwealth's alleged inappropriate handling of hazardous wastes concern past actions that are not likely to recur.[7] Most notably, the overpacked drums which Plaintiffs claim to have spotted on the adjacent Coombs property and which are identified as the possible source of contamination have allegedly long since been removed from that site. Although Plaintiffs do request certain forms of damages against all Defendants, including the Commonwealth Defendants (see Ad Damnum Clause at ¶ D, E, F, H, and I), money damages for past violations of federal law are not available in suits brought under the Ex Parte Young doctrine. Green, 474 U.S. at 68; Quern v. Jordan, 440 U.S. 332, 337-38 (1979); Edelman v. Jordan, 415 U.S. 651, 664-65, 668, 678 (1974); Allegheny Cty. Sanitary Auth. V. U.S. E.P.A., 732 F.2d 1167, 1174 (3d. Cir. 1984). We note that Plaintiffs have also requested declaratory relief in the form of an order that would: "(1)) Declare Defendants strictly liable for all costs of response; (2) Declare Defendants in violation of RCRA, for storing and disposing of 'hazardous wastes' ... and operating a facility in violation of RCRA and its regulations; (3) Declare Defendants liable to Plaintiffs in equitable indemnity, trespass and nuisance." (Ad damnum clause at ¶ G.) However, the requested declaratory relief would do nothing more than establish the Commonwealth's liability for alleged past violations of federal and state law. Ex Parte Young does not apply where "the issuance of a declaratory judgment ... would have much the same effect as a full-fledged award of damages or restitution by the federal court, that latter kinds of relief being of course prohibited by the Eleventh Amendment." Green, 474 U.S. at 73. In sum, the Court perceives no basis here for the type of prospective relief contemplated by the Ex Parte Young doctrine.

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[7] To the extent that Plaintiffs would premise a continuing federal violation on the DEP's failure to remediate the alleged contamination on the Grines' property, we conclude -- for reasons discussed below -- that this is not an appropriate basis for relief under Ex Parte Young.

Second, the Ex Parte Young doctrine affords an injunctive remedy only with respect to conduct that is ministerial, not discretionary, in nature:

> There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case, the court can direct the defendant to perform this merely ministerial duty.

209 U.S. at 158 (citing omitted). To the extent that Plaintiffs seek prospective relief against the Commonwealth DEP and its agents here, the requested relief concerns conduct that is discretionary on the part of the DEP. Plaintiffs complain that the DEP did not act to prohibit the illegal dumping, did not seize the overpacked drums as evidence, have not acted to abate the imminent hazard on Plaintiffs' property, and have not otherwise enforced applicable provisions of the federal environmental laws. In essence Plaintiffs' claims against the Commonwealth Defendants are directed at the DEP's alleged failure, through its agents, to adequately enforce the federal environmental laws. However, decisions regarding when and how to enforce the environmental laws is discretionary with the DEP and its officials. See Proffitt v. Davis, 707 F. Supp. 182, 187 (E.D. Pa. 1989) (recognizing discretionary nature of agency's decision not to pursue a particular course of enforcement and holding that citizen suits provisions of RCRC and CWA provide no jurisdictional basis for action seeking to compel the Secretary of DER to enforce compliance with those statutes). The limited exception to Eleventh Amendment immunity carved out by Ex Parte Young was not intended to direct the conduct of state officials in carrying out their discretionary functions. 209 U.S. at 158-59.

For all of the foregoing reasons, we conclude that this Court lacks subject matter jurisdiction over Plaintiffs' federal environmental claims insofar as they are directed against the Commonwealth Defendants.

2. Plaintiffs' State Law Claims

Turning next to Plaintiffs' state law claims against the Commonwealth Defendants, we conclude that these claims are also barred by the Eleventh Amendment. "[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when -- as here -- the relief sought and ordered has an impact directly on the State itself." Pennhurst State School & Hosp. V. Halderman, 465 U.S. 89, 117 (1984) ("Pennhurst II"). Whether or not jurisdiction exists as to other claims in the case is "inconsequential -- the principle applies as well to state law counts brought into federal court under pendent jurisdiction." Allegheny Ct. Sanitary Auth., 732 F.2d at 1173. See also Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1176 (3d Cir. 1987) (Eleventh Amendment, absent state consent, precludes federal courts from entertaining pendent state law claims against state agencies and officers seeking relief for violations of state law) (citation omitted). Because we have previously determined that the allegations against the Commonwealth Defendants are directed at the DEP itself, through Wozniak and Holler acting in their official capacities, Plaintiffs' state law claims impact on the Commonwealth and are barred by Eleventh Amendment immunity.

Plaintiffs argue that the Commonwealth has consented to the suit of its agencies under the Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. C.S.A. §§ 6020.101 et seq. (Purdons 1993), thereby suggesting that this Court has jurisdiction over that claim against the Commonwealth Defendants. However, it appears that Plaintiffs' Count III asserts a PHSCA claim only as against Defendant Coombs, Yost, Shrum, and Rotocast. The Commonwealth Defendants

are not named in that particular count. (See Amended Complaint ¶ 100.) Thus, for purposes of determining the Commonwealth Defendants' amenability to suit in federal court for state law violations, the PHSCA claim would appear irrelevant.

Assuming arguendo that the Commonwealth Defendants had specifically been named under Count III, we would nevertheless conclude that Eleventh Amendment immunity bars such a claim in federal court. In support of their argument that this Court has jurisdiction over the Commonwealth Defendants under PSCA, Plaintiffs rely heavily on Reading Co. v. City of Philadelphia, 829 F. Supp. 127 (E.D. Pa. 1993). In Reading Co., the district court utilized a two-step analysis in concluding that the PHSCA specifically waives the Commonwealth's sovereign immunity. The court first observed that the Act repeatedly imposes liability on any "person" who engages in certain types of conduct. See 829 F. Supp. At 130 (citing 35 Pa. Stat. §§ 6020.701(a), 6020.702(a), 6020.705(a). The court then focused on the statutory definition of "person," which specifically includes "... state governments, and political subdivisions." Id. (citing 35 Pa. Stat. §6020.103). However, even if we were to agree with the Reading Co. court's conclusion that the PHSCA specifically waives the Commonwealth's sovereign immunity under Pennsylvania law -- an issue which this Court need not reach -- that would not end our inquiry. The mere fact that a sate has consented to be sued does not mean it has consented to be sued in federal court, for "a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 241 (1985) (quoting Pennhurst II, 465 U.S. at 99) (emphasis in original). Indeed, the Pennsylvania Legislature has expressly preserved the Commonwealth's immunity from suit in federal court:

> (a) General rule. --Except as otherwise provided in this subchapter, no provision of this title shall

> constitute a waiver of sovereign immunity for the purpose of 1 Pa. C.S. § 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.
>
> (b) *Federal Courts. -- Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.*

42 Pa. C.S.A. § 8521 (Purdons 1996) (emphasis supplied). See also Pennhurst II, 465 at 103 n.12 (citing § 8521(b) and rejecting the argument that Pennsylvania has waived its immunity from suit in federal court). The Commonwealth's general sovereign immunity statute explicitly states that "[w]hen the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought *only in such manner and in such courts and in such cases as directed by the provisions of Title 42 ... unless otherwise specifically authorized by statute.* 1 Pa. C.S.A. § 2310 (Purdons 1995) (emphasis supplied). The citizen suit provision of the PHSCA states "[t]the courts of common pleas shall have jurisdiction over any actions authorized under this section," 35 Pa. Stat. Ann. § 6020.1115(b) (Purdons 1993), but it makes no reference to -- and certainly does not "specifically authorized" -- suit in federal court. This Court is therefore hard-pressed to glean from these collective provisions a waiver of the Commonwealth's Eleventh Amendment immunity for the purposes of citizen suits under the PHSCA. See Atascadero State Hosp., 473 U.S. at 241 ("[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court.*") (emphasis in original).

Nor do we agree with Plaintiffs' position that the Reading Co. court "state[d] categorically that the Eleventh Amendment does not protect state agencies from suit in

Federal Court." (See Pl.s' Br. In Response to Commwealth's Mot. to dismiss at p. 12.) In Reading Co., the district court ruled that Pennsylvania's law of sovereign immunity did not bar a claim against the defendant, Southeastern Pennsylvania Transportation Authority ("SEPTA"), under PHSCA. See 829 F. Supp. At 129-31. What the Reading Co. court did not address, because it was not an issue in the case, is whether the Eleventh Amendment protects SEPTA from suit in federal court. See id. at 129 n.1 ("What is at issue in the instant motion is not whether SEPTA is entitled to Eleventh Amendment protection, but rather *whether Pennsylvania's law of sovereign immunity* protects SEPTA from [P]HSCA claims.") (emphasis supplied). The distinction is significant. Under Third Circuit precedent, federal courts use a somewhat detailed inquiry to determine whether an entity qualifies as an alter ego of the Commonwealth for purposes of Eleventh Amendment immunity. See Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F.2d 807, 818-21 (3d Cir. 1991); Fitchik v. New Jersey Transit Rail Operations, 873 F.2d 655, 659-64 (3d Cir. 1989), cert. denied, 493 U.S. 850 (1989). The Reading Co. court did not need to consider whether SEPTA -- an entity created by the Commonwealth to provide public transportation in the Southeastern Pennsylvania region -- qualified for Eleventh Amendment immunity because the Third Circuit had already resolved that issue unfavorably to SEPTA in a prior en banc decision. See Bolden, 953 F.2d at 821 (quoted in Reading Co., 829 F. Supp. At 129 n.1).[8] What the Reading Co. court actually determined is that, for purposes of *Pennsylvania sovereign immunity principles*, SEPTA is amenable to suit under the PHSCA. Nowhere in its decision did the Reading Co. court go so far as to hold that the

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[8] By contrast here, there is little doubt that the DEP constitutes a mere alter ego of the Commonwealth for purposes of Eleventh Amendment immunity. See Fiore v. Kelly Run Sanitation, Inc., 609 F. Supp. 909, 912 (W.D. of Pa. 1985) (recognizing that the state DER, as an agency of the state itself, may not be sued in federal court unless the state has waived its Eleventh Amendment immunity or Congress has subjected states to suit pursuant to Section 5 of the Fourteenth Amendment).

Eleventh Amendment never applies in PHSCA suits against state agencies in a federal court. Moreover, to the extent that Reading Co. can be read as implicitly holding that the PHSCA waives Eleventh Amendment immunity for all state agencies, we are neither bound by -- nor persuaded by -- that conclusion. As previously noted, the PHSCA waives the Commonwealth's immunity to be suit in state common pleas courts. Under 1 Pa. C.S.A. § 2310 and 42 Pa. C.S.A. § 8521(b), however, that waiver may not be read expansively so as to include suit in federal court. See Oley Twp. V. Delaware River Basin Comm'n, 906 F. Supp. 284, 287 (E.D. Pa. 1995) ("The standard for finding waiver [of Eleventh amendment immunity] is stringent as the state's consent must be by the 'most express language or by such overwhelming implications from the test as [will] leave no room for any other reasonable construction.'") (quoting Atascadero, 473 U.S. at 239-240) (second alteration in original).

Finally, Plaintiffs cite to several cases purportedly in support of the proposition that the DEP and its agents may be liable under CERCLA and/or the PHSCA as potential "owners" or "operators" of the Site in question. See, e.g., FMC Corp. v. U.S. Dept. of Commerce, 29 F.3d 833 (3d Cir. 1994); United States v. Carolina Transformer Co., 978 F.2d 832, 836-37 (4th Cir. 1992); General Electric Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992); Apex Oil Co. v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976), cert. denied, 429 U.S. 827 (1976); Prisco v. State of New York, 902 F. Supp. 400 (S.D. N.Y. 1995); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1448 (E.D. Cal. 1995); United States v. Atlas Minerals and Chem., Inc., 797 F. Supp. 411, 420 (E.D. Pa. 1992); In re Paoli R.R. Yard PCB Litigation, 790 F. Supp. 94, 95-96 (E.D. Pa. 1992), aff'd, 980 F.2d 724 (3d Cir. 1992). This argument is unavailing.

First, as we have previously discussed, following the Supreme Court's decision in Seminole Tribe, it appears that any attempt by Congress to abrogate the States' Eleventh Amendment Immunity pursuant to the Commerce Clause of

Article I of the U.S. Constitution is invalid. Accordingly, for the reasons previously stated, and because we have found no applicable exception under Ex Parte Young, Plaintiffs' claims against the Commonwealth Defendants under CERLCA, RCRA, and CWA are barred by the Eleventh Amendment. Notably, all of the cases cited by Plaintiffs in support of its "owner/operator" liability theory predate the Supreme Court's decision in Seminole Tribe. Therefore, these cases can provide little guidance on the issue of Eleventh Amendment immunity following Seminole Tribe. Plaintiffs' remaining arguments in opposition to dismissal of their CERCLA, RCRA, and CWA claims are unconvincing.

With respect to Plaintiffs' claims under the PHSCA, we note that the Commonwealth Defendants are not named as Defendants under that specific count. Even if they were, however, we have determined that the PHSCA does not waive the Commonwealth's immunity from suit in federal court under the Eleventh Amendment. Plaintiffs have advanced no argument as to why the remainder of their state claims against the Commonwealth would not be barred by the Eleventh Amendment, and we cannot conceive of one.

Because Eleventh Amendment immunity bars both Plaintiffs' federal and state claims against the Commonwealth, this Court is without subject matter jurisdiction. The Court therefore need not address the Commonwealth Defendants' alternative arguments for dismissal.

III. CONCLUSION

Based upon the foregoing reasons, we will dismiss the Plaintiffs' claims against the Commonwealth Defendants with prejudice.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al., Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al., Defendants	)	

ORDER

AND NOW, this 31st day of December, 1996, for the reasons stated in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Commonwealth Defendants' Motion [Doc. No. 20] to Dismiss Amended Complaint is GRANTED and all claims against the Commonwealth Department of Environmental Protection, Gary Wozniak and Daniel Holler are dismissed with prejudice.

/s/_____
Sean J. McLaughlin
United States District Judge

cm: All parties of record. /s/TH

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al.,	)	
Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
	)	
WILLIAM R. COOMBS, et al.,	)	
Defendants	)	

MEMORANDUM OPINION

McLAUGHLIN, District J.

Presently pending before the court in the above-captioned matter is a motion by the Plaintiffs seeking reconsideration of this Court's Memorandum Opinion and Order of December 31, 1996 and a separate order entered on February 9, 1998. For the reasons set forth below, we will amend our prior order of December 31, 1996 such that Plaintiffs' state law claims against the Commonwealth Defendants are dismissed without prejudice. In all other respects, Plaintiffs' motion for reconsideration will be denied.

I. PROCEDURAL HISTORY

Plaintiffs in this action are property owners in Tionesta Borough, Pennsylvania. They claim that their property has been contaminated with various hazardous chemicals and pollutants at the hands of their up-gradient neighbors, William R. Coombs and Billie M. Yost. On April 2, 1996, Plaintiffs filed a nine-count Amended Complaint, in which they named as Defendants Coombs, Yost, and various other public and private individuals and entities. Among the nine causes of action asserted in the Amended Complaint are federal law claims under the

Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901 *et seq.* (West 1995), the Federal Water Pollution Control Act ("Clean Water Act") or "CWA"), 33 U.S.C.A. §§1251, *et seq.* (West 1986), and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA", 42 U.S.C. §§9610 *et seq.* (West 1995), as amended by the Superfund Amendments and Reauthorization Act of 1986.

By Memorandum Opinion and Order entered on December 31, 1996, this Court dismissed all of the claims against the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") and two of its agents, Defendant Daniel Holler and Gary Wozniak (collectively referred to as the "Commonwealth Defendants"). Although the Commonwealth Defendants asserted numerous bases for dismissal, the Court ultimately disposed of the claims on Eleventh Amendment immunity grounds. With respect to the claims against the DEP itself, the Court found that the DEP, as an arm of the Commonwealth, was immune from suit in federal court under the Eleventh Amendment. We determined, in light of the Supreme Court's decision in Seminole Tribe of Florida v. Florida, -- U.S. --, 116 S. Ct. 1114 (1996), that Congress's attempt to abrogate Eleventh Amendment immunity under the federal environmental laws was not done pursuant to any valid exercise of constitutional authority. Therefore, we reasoned, the Commonwealth's sovereign immunity -- having been neither waived by the Commonwealth nor validly abrogated by Congress -- remained intact. Plaintiffs do not appear to challenge this portion of the Court's ruling.

We then considered the potential liability of Defendants Holler and Wozniak. Initially, we determined that the claims against Holler and Wozniak were essentially directed at actions taken by them in their official capacity as agents of the DEP. We concluded that the Commonwealth was the real party in interest and that, consequently, the Eleventh Amendment barred any recovery by Plaintiffs for

retrospective relief or damages under their federal causes of action.

The Court next considered whether any prospective relief was appropriate under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). We considered the nature of Plaintiffs' claims by examining the allegations in their Amended Complaint. In particular, we noted that Plaintiffs had not identified any prospective unconstitutional conduct or continuing violations of federal law on the part of the Commonwealth officials. Instead, all averments relating to the officials' alleged misconduct appeared to involve past conduct. To the extent that Plaintiffs' claims were premised upon the Commonwealth Defendants' continuing failure to adequately investigate and/or remediate the alleged contamination, we concluded that Ex Parte Young did not provide a basis for prospective relief under the federal environmental statutes at issue. See Proffit v. Davis, 707 f. Supp. 182, 187 (E.D. Pa. 1989) (recognizing discretionary nature of agency's decision not to pursue a particular course of enforcement and holding that citizen suits provisions of RCRA and CWA did not provide a jurisdictional basis for action seeking to compel Secretary of DER to enforce compliance with those statutes).

Finally, with respect to Plaintiffs' state law claims, we noted that the Eleventh Amendment also bars any suit in federal court against the Commonwealth for alleged violations of state law. Further, the narrow exception of Ex Parte Young does not apply to Plaintiffs' state law claims. Based on the foregoing reasons, we dismissed Plaintiffs' claims against the Commonwealth Defendants with prejudice by order dated December 31, 1996. Plaintiffs subsequently sought to appeal the ruling, but the Third Circuit Court of Appeals dismissed the appeal as premature.

Thereafter, on December 18, 1997, Plaintiffs filed a motion for an order adjudging the Commonwealth Defendants and the United States Environmental Protection

Agency[1] in civil contempt ("contempt motion"). This motion is generally based on the governmental Defendants' alleged failure to turn over documents and information to which Plaintiffs claim they are legally entitled. By order dated February 9, 1998, this Court directed that the hearing on Plaintiffs' civil contempt motion would be limited in scope to allegations concerning the conduct of the EPA and not the Commonwealth Defendants, as the Commonwealth Defendants had previously been dismissed from the case on Eleventh Amendment immunity grounds.

Meanwhile, on February 23, 1998, Plaintiffs filed the instant motion for reconsideration of both the December 31, 1996 order dismissing the Commonwealth Defendants from the case and the February 9, 1998 order limiting the scope of the hearing on Plaintiffs' contempt motion. Plaintiffs represent that the instant motion for reconsideration is grounded upon:

> Intervening legal developments in the form of a Supreme Court decision which challenges the propriety of the Court's original ruling, and the discovery of new evidence that the DEP withheld from Plaintiffs the data necessary for validation of test results, in the fac[e] of its representation to the Court and to Plaintiffs that all information relating to contaminants on the Coombs and Grine sites was made accessible to Plaintiffs.

(See Pl.'s Mot. at pp. 2-3.) In addition, Plaintiffs raise various procedural objections to the court's decision to dismiss the Commonwealth Defendants.

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[1] Plaintiffs filed a claim against the United States EPA under the Freedom of Information Act, 5 U.S.C.A. §552 (West 1996 and 1998 Supp.). The motions relative to the claims against the EPA are dealt with in a separate memorandum opinion.

II. TIMELINESS AND STANDARD OF REVIEW

As a preliminary matter, we must determine the correct procedural framework for addressing the instant motion. The Commonwealth Defendants contend that reconsideration is only proper, if at all, pursuant to Rules 59(e)[2] or 60(b)[3] of the Federal Rules of Civil Procedure. Defendants further contend that, under either rule, the motion for reconsideration is untimely. Plaintiffs' motion was filed more than 13 months after the entry of the original order which is now being challenged. Rule 59(e) requires that a motion to amend or alter a judgment be brought within ten days after entry of the judgment. See Fed. R. Civ. P. 59(e). Rule 60(b) requires that motions be brought "within a reasonable time" and, for motions based upon subsections (1), (2) or (3), within a year of entry of the judgment. See Fed. R. Civ. P. 60(b).

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[2] Rule 59(e) provides as follows:

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.
Fed. R. Civ. P. 59(e).

[3] Rule 60(b) provides, in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or parties legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Fed. R. Civ. P. 60(b).

However, both Rules 59(e) and 60(b) apply only where the subject order is final, as opposed to interlocutory. See Confer v. Custom Eng. Co. Employee Health Benefit Plan, 760 F. Supp. 75, 77 (W.D. Pa. 1991), aff'd in part, appeal dismissed in part, 952 F.2d 41 (3d Cir. 1991). The Court's order of December 31, 1996 disposed only of the claims against some, but not all, of the named Defendants. Therefore, the operative rule here is Rule 54(b):

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the right sand liabilities of all the parties.

Fed. R. Civ. P. 54(b). Because the order of December 31, 1996 was never certified by this Court as a final judgment, the order remained interlocutory[4] and, by the express terms of this rule, is subject to revision at any time prior to final adjudication of all the claims and the rights and liabilities of all the parties. Fed. R. Civ. P. 54(b). See Confer, 760 F. Supp. At 77 (where defendants sought reconsideration as to partial

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[4] Indeed, when the Plaintiffs sought to take an appeal from the decision, the appeal was considered interlocutory and was therefore dismissed by the Third Circuit Court of Appeals for lack of jurisdiction.

judgment in favor of some but not all plaintiffs, the only vehicle for reconsideration was Rule 54). We therefore conclude that the motion for reconsideration is timely under Rule 54(b).

The next issue is the standard of review which ought to be applied to the instant motion. Although "[t]he standard for granting a motion for reconsideration under Rule 54 is undoubtedly less rigid than under 60(b)," Confer, 760 F. Supp. At 77 (citing Fed. R. Civ. P. 60(b) Advisory Committee's Notes; Farr Man & Co., Inc. v. M/V Rozita, 903 F.2d 871 (1st Cir. 1990)), courts attach "considerable import" to the rendering of a judgment, whether or not it is final. See id. Accordingly, reconsideration of our prior decision is only appropriate in order to correct manifest errors of law or fact or to consider newly discovered evidence relating to the prior decision. Id. (citing Harsco Corp. v. Zlotnick, 779 f.2d 906 (3d Cir. 1985)).[5] With this standard in mind, we turn to the substance of Plaintiffs' motion for reconsideration.

III. DISCUSSION

Plaintiffs represent that their motion is grounded upon "intervening legal developments" which cast doubt on the propriety of this Court's previous ruling. They also claim to have new evidence indicating that the DEP has withheld data which Plaintiffs feel was necessary in order for them to verify the soil, water, and sludge testing performed by the DEP both on their property and on the up-gradient Coombs property. Finally, Plaintiffs have lodged various objections which can broadly be described as

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[5] The same standard would apply if we were to entertain reconsideration under the "law of the case" doctrine. See Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116-17 (3d Cir. 1997) (notwithstanding the "law of the case" doctrine, courts are warranted in reconsidering issues previously decided in the course of litigation where "extraordinary circumstances" exist, e.g. where: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice).

procedural objections. We will first consider Plaintiffs' arguments as they relate to our ruling of December 31, 1996 by which we dismissed the claims against the Commonwealth Defendants. We will then consider the Plaintiffs' arguments as they relate to our February 9, 1998 ruling defining the scope of the contempt hearing.

1. Plaintiffs' Motion for Reconsideration of the Order of December 31, 1996

A.

We first consider whether supervening "new law" requires a modification of the December 31, 1996 opinion and order. Although Plaintiffs base their motion in part upon "intervening legal developments," it is not clear in what respect Plaintiffs feel the relevant law underlying our previous decision has changed. Plaintiffs refer the Court to a recent Supreme Court decision, Idaho v. Coeur d'Alene Tribe of Idaho, -- U.S. --, 117 S. Ct. 2028 (1997). That case involved a lawsuit brought by a federally recognized Indian tribe against the State of Idaho, various state agencies, and various state officials in their individual capacities. The tribe alleged ownership in submerged lands and the bed of a lake and its tributaries which were within the 1873 boundaries of its reservations. A majority of the Court ruled that the Eleventh Amendment barred a federal court from hearing the tribe's claim. Insofar as the claims were asserted against state officials in their individual capacities, a majority held that no relief was available under the doctrine of Ex Parte Young.

In Coeur d'Alene, Justice Kennedy, as author of the principal decision, sought to articulate an individualized standard for applying the doctrine of Ex Parte Young. He advocated an approach that would consider, on a case-by-case basis, "the real affront to a State of allowing a suit to proceed" on the basis of prospective relief. 117 S. Ct. at 2038. However, only Justice Rhenquist adopted the approach

outlined by Justice Kennedy. Three justices -- O'Connor , Scalia and Thomas -- concurred in the judgment but declined to join in that portion of the principal decision which advocated a "case-by-case" (rather than a rule-based) approach to Ex Parte Young. Accordingly, there appears to be a consensus among the lower federal courts that, following Coeur d'Alene, "a majority of the [Supreme] Court would continue to apply the rule of Ex [P]arte Young as it has been traditionally understood." See Earles v. State Bd. of CPAs of Louisiana, 139 F.3d 1033, 1039 (5th Cir. 1998) (citing cases), reh'g and suggestion for reh'g en banc denied, No. 97-30159, -- F.3d -- (5th Cir. 1998) (Table Case). In sum, then we do not perceive any significant change in the jurisprudence of Ex Parte Young and its progeny, and Plaintiffs, although professing a change in the law, have not specified how the recent Supreme Court decision requires a different result. They appear to rely on Coeur d'Alene for the proposition that, when no state forum is available to vindicate federal interests, a special obligation is placed upon district courts to ensure the supremacy of federal statutory and constitutional law. Thus, Plaintiffs reason, prospective relief under Ex Parte Young is particularly appropriate here, since their federal claims cannot be entertained in state court. (Pl.s' Mot. For Reconsideration at 16.) However, we note once again that part of the principal decision on which Plaintiffs rely, 117 S. Ct. at 2035, was adopted only by Justices Rhenquist and Kennedy. As such, it does not constitute a majority ruling or binding precedent.

B.

Plaintiffs also contend that the Court erred in finding that there was no basis for relief under the doctrine of Ex Parte Young. They claim Defendants Holler and Wozniak have committed on-going violations of federal law for which prospective relief is appropriate, *to wit*:

> ...agents of the DEP, with knowledge that listed hazardous substances were

> detected in the drums, secretly assisted Defendant Coombs in moving them off-site, without a permit, to his home in McDonald, PA. No administrative on-the-record order authorized this illegal transport of hazardous materials. Transport of unpermitted and listed hazardous materials is an ongoing violation of federal law ...

(Pl.s' Mot. for Reconsideration at 17.)

We find this proffer insufficient as a basis for reconsideration. Even assuming *arguendo* the truth of the allegation, it is not clear in what respect Plaintiffs can be said to have suffered injury as a result of the alleged transportation of offensive barrels *from* Coombs's campsite in Tionesta Borough *to* Coombs's residence in McDonald, Pennsylvania. Given that the basis of this entire lawsuit is the alleged presence of hazardous substances on the Coombs campsite, which (according to Plaintiffs) have allegedly contaminated their down-gradient property, the removal of the alleged hazardous substances from the campsite would appear to benefit Plaintiffs, not harm them. To the extent that Plaintiffs are complaining that the alleged movement of the barrels was a *per se* violation of RCRA because it constituted a transfer of hazardous waste without a permit, Plaintiffs have not demonstrated that they have standing to pursue such a claim. "Congress' provision for citizen suits does not, in itself, establish Article III standing." Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc. (hereinafter "PIRG of New Jersey"), 123 F.3d 111, 120 (3d Cir. 1997) (quoting Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 (4th Cir. 1988)). In order to successfully assert a claim under the citizen suit provisions of the federal environmental laws, a plaintiff must establish that he or she has standing by demonstrating: (I) an injury in fact, i.e. an invasion of a legally protected interest which is concrete and particularized and actual or imminent; (ii) a

causal link between the defendant's conduct and the injury, such that the conduct is "fairly traceable" to that conduct; and (iii) the likelihood that judicial relief will redress the plaintiff's injury. See PIRG of New Jersey, 123 F.3d at 117, 199. Assuming for the moment that Plaintiffs can prove that the DEP agents secretly assisted Defendant Coombs in removing toxin-containing barrels to another location remote from Plaintiffs' property, they have not demonstrated or even alleged any injury or threat of injury resulting from this alleged unpermitted transfer.[6] PIRG of New Jersey, 123 F.3d at 120 (Clean Water Act does not authorize private causes of action against polluters absent some showing of injury or threat of injury); Pape v. Lake States Wood Preserving, Inc., 948 F. Supp. 697, 700 (W.D. Mich. 1995) (plaintiff had no standing to bring RCRA citizen suit where he lived 150 miles from site of defendant's alleged pollution and failed to demonstrate threat of imminent personal injury), aff'd, 98 F.3d 1342, 1996 WL 571306 (6th Cir. 1996) (TABLE NO. 95-2266) (noting that plaintiff had not provided any evidence to support his allegation that the defendant polluted the area surrounding his property). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-67 (1992) (plaintiffs had not standing to enforce Endangered Species Act where they lacked any connection to the situs of injury). C.f. Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1322 (7th Cir. 1992) (citizens' group had standing to pursue RCRA claim where it represented persons living close to the alleged situs of pollution who were subject to the potential injury), reh'g and reh'g en banc denied, October 5, 1992.

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[6] To the extent that Plaintiffs' injury is premised upon the DEP's alleged failure to adequately investigate and/or to preserve this evidence, such a claim is insufficient as a basis for reconsideration. As we previously discussed in our December 31, 1996 memorandum opinion, the citizen suit provisions of RCRA, CERCLA and CWA do not provide a mechanism for challenging the DEP's investigative or regulatory measures.

C.

Plaintiffs have also raised several procedural objections to the Court's December 31, 1996 decision. They claim, for example, that they have been denied due process inasmuch as they were never put on notice that the Court would entertain a dismissal under Fed. R. Civ. P. 12(b)(1). Plaintiffs suggest that they were unfairly surprised because the Commonwealth Defendants' original motion to dismiss never cited Federal Rule 12(b)(1) as a basis for dismissal. This assertion borders on absurd and is easily disposed of. In their original papers moving for dismissal, the Commonwealth Defendants spelled out several grounds on which they believed dismissal was warranted. Among other things, the Commonwealth Defendants argued that they were immune from suit in federal court under the Eleventh Amendment to the U.S. Constitution and that Plaintiffs failed to identify a viable cause of action against them in the Amended Complaint. Plaintiffs responded to these arguments in their brief opposing the motion to dismiss. It is unfathomable that Plaintiffs can now argue that they were surprised that the Court considered the issue of Eleventh Amendment immunity. And, while the Commonwealth Defendants may not have specifically cited Fed. R. Civ. P. 12(b)(1) in their motion to dismiss, it should not have been surprising to Plaintiffs that the Court would analyze the Eleventh Amendment issue under that particular rule. Although the Eleventh Amendment is not strictly jurisdictional, it creates sovereign immunity which partakes of jurisdictional qualities. See e.g., Sullivan v. Barnett 139 F.3d 158, 179 (3d Cir. 1998) ("At this juncture, we raise an Eleventh Amendment sovereign immunity issue sua sponte as it is relevant to our jurisdiction over the Commonwealth Defendants."), pet. for cert. filed, June 11, 1998. Thus, federal courts have treated Eleventh Amendment immunity as a jurisdictional issue that can be raised sua sponte, even for the first time at the appellate level. See Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n of Commonwealth of Pa., 141 F.3d 88, 91 (3d Cir. 1998); Sullivan, 139 F.3d at 179

(citing cases); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 365 (3d Cir. 1997) ("Because the [Eleventh Amendment] immunity issue 'sufficiently partakes of the nature of a jurisdictional bar,' ... it is an issue that may be raised at any time during the pendency of the case.") (internal citation omitted), pet. for cert. filed, 67 U.S.L.W. 3084 (July 17, 1998). Furthermore, numerous federal courts have entertained motions to dismiss on sovereign immunity grounds under the rubric of Fed. R. Civ. P. 12(b)(1). See e.g., Williams v. United States, 50 F.3d 299, 304-05, 307 (4th Cir. 1995); Union Pacific R.R. Co. v. Burton, 949 F. Supp. 1546, 1552 (D. Wyo. 1996); Hines v. Irvington Counseling Ctr., 933 F. Supp. 382, 387-88 (D.N.J. 1996) (addressing federal government's sovereign immunity); Taylor v. Commonwealth of Virginia, Dept. of Transportation, 170 F.R.D. 10, 13 (E.D. Va. 1996); Radeschi v. Commonwealth of Pennsylvania, 846 F. Supp. 416, 418-19 (E.D. Pa. 1993). See also 5A Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure §1350 (1990 & 1998 Supp.) (Rule 12(b)(1) motion to dismiss for lack of jurisdiction over subject matter may also be appropriate when plaintiff's claim is barred by sovereign immunity). Moreover, even if it could be said that this Court erred in analyzing the Eleventh Amendment immunity issue under rule 12(b)(1), the error would be a harmless one of form over substance. Plaintiffs were aware of the Defendants' Eleventh Amendment immunity argument and responded to it as they saw fit in their oppositional brief. In addition, Plaintiffs received the benefit of certain procedural safeguards. In addressing the Commonwealth Defendants' motion to dismiss, the Court interpreted the averments in Plaintiffs' Amended Complaint as true and drew all reasonable factual inferences from the complaint in the light most favorable to them. See Radeschi, 846 F. Supp. At 419 (court may dismiss an action for lack of subject matter jurisdiction based on facial challenge to complaint only if it affords the plaintiff the safeguard of accepting all allegations of the complaint as true, drawing reasonable factual inferences from the complaint in plaintiff's favor, and only if

it appears to a certainty that the pleader will not be able to assert a colorable claim of subject matter jurisdiction). The Court also recognized that the Commonwealth Defendants, as proponents of Eleventh Amendment immunity, bore the burden of proving the applicability of that doctrine.[7] In short, Plaintiffs were plainly put on notice of the Eleventh Amendment immunity argument and cannot be heard to claim unfair surprise or other prejudice.

Plaintiffs also generally object that the Court, prior to entering a dismissal on the grounds of Rule 12(b)(1), was required to hold an evidentiary hearing to resolve disputed issues of material fact. The Third Circuit has recognized that "when there is a factual question about whether a court has jurisdiction, the trial court may examine facts outside the pleadings and thus 'the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56 ... in such a circumstance, a trial court 'is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" Robinson v. Dalton, 107 f.3d 1018, 1021 (3d Cir. 1997) (internal citation omitted). However, in light of the procedural posture of this case, Plaintiffs' contention that the Court was required to hold an evidentiary hearing is misplaced. The Court's decision was not premised upon resolution of any factual issues disputed by the parties. Rather, the Court's dismissal order was based upon purely legal principles which, we concluded, flowed ineluctably from the manner in which the Plaintiffs had pleaded their Amendment Complaint.[8]

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[7] See Op. of 12/31/96 at 12 n.5 (citing Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995), cert. denied, -- U.S. --, 116 S. Ct. (1995)).

[8] Some of the purported factual disputes highlighted by Plaintiffs in their motion for reconsideration concern new averments of misconduct allegedly based on new evidence. For example, Plaintiffs claim to have uncovered new "material" evidence showing that the DEP agents have failed to produce the complete and unedited file relating to soil and/or water samples taken from their own property as well as from Coombs's property. They characterize this conduct as a deliberate attempt to

Plaintiffs further contend that this Court's dismissal of their claims with prejudice was erroneous, given that the dismissal was premised on jurisdictional grounds. The Court acknowledges that ordinarily, a dismissal based on lack of subject matter jurisdiction per Fed. R. Civ. P. 12(b)(1) is without prejudice and does not address the merits of the plaintiff's claims. See In re Orthopedic "Bone Screw" Products Liability Litigation, 132 F.3d 152, 155 (3d Cir. 1997). Here, however, a dismissal without prejudice serves no purpose, at least insofar as Plaintiffs' federal claims against the Commonwealth Defendants are concerned. Federal District courts have exclusive jurisdiction over private citizens' suits brought under RCRA, the Clean Water Act and CERCLA. See 42 U.S.C. §6972(a) (RCRA); 42 U.S.C. §9659(b)(1) and (c) (CERCLA); 33 U.S.C. §1365(a) and (c)(1) (CWA). We have determined, based on the allegations set forth in the Amended Complaint, that the Eleventh Amendment protects the Commonwealth Defendants from defending against this suit in federal court. Because Plaintiffs cannot bring their federal claims elsewhere, those claims are effectively barred. Dismissal of those claims without prejudice therefore serves no meaningful purpose. Nevertheless, we will amend our prior order of December 31, 1996 such that the dismissal of Plaintiffs' state law claims against the Commonwealth Defendants is without prejudice.

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conceal, lose or obscure testing events and the results of those tests. Plaintiffs claim, among other things, that Defendants Holler and Wozniak failed to take and preserve environmental samples, prematurely aborted their investigation before meaningful evidence of the source of the contamination could be found, concealed vital evidence relative to the source of the contamination, and destroyed or altered evidence relating to sample procurement. Even accepting these allegations as true for the moment, Plaintiffs have not explained how they give rise to a cause of action under RCRA, CWA or CERCLA (or their pendent state law claims), nor have they sought leave to amend their complaint to plead any other appropriate cause of action. The mere allegation of newly uncovered misconduct does not necessarily persuade the Court that its prior dismissal was erroneous unless Plaintiffs can demonstrate that the newly discovered misconduct provides them with a potentially viable cause of action.

2. *Plaintiffs' Motion to Reconsider the Order of February 9, 1998*

On January 17, 1998, Plaintiffs filed a motion requesting this Court to enter an order adjudging both the EPA and the Commonwealth Defendants in civil contempt ("contempt motion"). By order dated February 9, 1998, the Court directed that the upcoming hearing on Plaintiffs' contempt motion would be limited to consideration only of the conduct of the EPA. The Court excluded the Commonwealth Defendants from the scope of the hearing on the ground that the Court lacked jurisdiction over those Defendants following their dismissal from the case.

Plaintiffs claim, however, that they have discovered new evidence which purportedly shows that the DEP withheld and/or destroyed data relating to its investigation of the Plaintiffs' complaints. Plaintiffs claim that they were entitled to this data and that it was needed in order for them to confirm the results of various testing performed by the DEP officials. Ultimately, this discovery does not relate to any viable cause of action as originally pleaded in the Complaint or Amended Complaint. Therefore, it does nothing to advance this Court's jurisdiction over the Commonwealth Defendants.

Moreover, Plaintiffs cannot establish that the Commonwealth Defendants have violated a specific order of this Court. In order to establish the propriety of civil contempt, a plaintiff must prove three elements by clear and convincing evidence: (1) that a valid order of the court existed; (2) that the defendants had knowledge of that order; and (3) that the defendants disobeyed the order. Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). The terms of the order must be sufficiently clear and precise to give fair warning to the contemnor that he or she is in violation of the order. Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995) ("Specificity in the terms of consent decrees is a predicate to a finding of contempt ... because 'a person will

not be held in contempt ... unless the order has given him fair warning.'") (internal citation omitted), reh'g denied (Mar 16, 1995). Here, Plaintiffs have not demonstrated, or even alleged, that the Commonwealth Defendants are in violation of any court order.[9] Instead, Plaintiffs claim that counsel for the DEP made misrepresentations to this Court when, during a pretrial conference, he stated that he had voluntarily produced all relevant documentation in this agency's file concerning the Plaintiffs' case:

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> THE COURT: Well, then, it seems to me that the injunction hearing which we had previously scheduled for November 19th, given the fact that you have injunctive and damage claims and you have a request for jury trial, should not take place. And that is to say that this matter should be set down on our jury term which raises this issue. I assume that any discovery, tot he extent that there has been any discovery in the case, has been directed primarily at the issues which implicate the injunctive aspect of the case, is that correct?
>
> [Counsel for the EPA]: I believe so, judge.
>
> [Plaintiffs' counsel]: There has been no discovery taken.

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[9] Although the Plaintiffs' contempt motion and motion for reconsideration loosely refer to violations of this Court's "orders" or "directives" to produce documentation (see e.g., Pl.s' Mot. for Order Adjudging Def. in Civ. Contempt [Doc. No. 133] at 4; Pl.s' Mot. for Reconsideration [Doc. 151] at 12), Plaintiffs do not actually identify any specific order compelling the Commonwealth Defendants to disclose the information now sought by them. For its part, this Court is not aware of any such order.

> [Counsel for the Commonwealth Defendants]: *We sat here for a day, we gave the [P]laintiffs' counsel all of the records from our files ... even though I don't think this court had the authority to direct them, we volunteered to do it, we did. They had a whole day's worth, sitting here, getting documents. I don't know what else we have. We have given them everything.*

(Tr. Of 11/13/96 Pretrial Conference [Doc. No. 101] at 4-5 (emphasis supplied).)

The foregoing language does not, in our opinion, constitute any potential basis for finding the Commonwealth Defendants in civil contempt. At most, assuming the truth of Plaintiffs' averments, the Commonwealth Defendants failed to follow through with a decision to voluntarily produce certain documentation which they were under no formal obligation to produce.[10] Plaintiffs have not cited any authority for the proposition that such conduct can serve as a basis for civil contempt. Although they have referred the Court to Telluride Management Solutions, Inc. v. Telluride Investment Group, 55 F.3d 463 (9th Cir. 1995), that case is factually distinguishable in material respects and does not provide persuasive authority for relief sought here.

IV. CONCLUSION

In sum, for the reasons previously stated, the Court will grant the Plaintiffs' motion for reconsideration and amend its Order of December 31, 1996 to reflect that Plaintiffs' state law claims against the Commonwealth

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[10] We note that no formal discovery had been served on the Commonwealth Defendants and hence, there was no outstanding order form this Court compelling the disclosure of any documentation. Nor did Plaintiffs ever attempt to compel production by way of a subpoena duces tecum. Alternatively, Plaintiffs might have sought to obtain the desired documentation by enforcing their state law remedies under the Pennsylvania "Right to Know" Act. See PA. STAT. ANN. tit. 65, §§66.1 *et seq.* (West 1959 and 1998 Supp.).

Defendants are dismissed without prejudice. In all other respects, the Plaintiffs' motion for reconsideration is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al., Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al., Defendants	)	

ORDER

AND NOW, this 17th day of August, 1998, IT IS HEREBY ORDERS that Plaintiffs' Motion [Doc. No. 151] for Reconsideration is GRANTED and the Court's Order of December 31, 1996 is amended to the following extent: the Order will reflect that Plaintiffs' state law claims against the Commonwealth Defendants will be dismissed without prejudice. In all other respects, Plaintiffs' Motion [Doc. No. 151] for Reconsideration is DENIED.

IT IS FURTHER ORDERED that, upon consideration of the Commonwealth Defendants' Motion [Doc. No. 158] for Entry of Final Judgement Pursuant to Fed. R. Civ. P. 54(b) and the Plaintiffs' brief in opposition thereto, said motion is GRANTED. The Court finds that there is no just reason for delay and that entry of final judgment is warranted for the reasons set forth in the Defendants' motion and supporting brief.

IT IS THEREFORE ORDERED that the Court's Order of December 31, 1996, as amended herein, be entered as a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

/s/_____
Sean J. McLaughlin
United States District Judge

cm: All counsel of record./TH/